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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 33

CHARLES QUICKSALL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Michigan Supreme Court is reported in *People* v. *Quicksall*, 322 Mich. 351, and also appears in the printed record at page 95. The trial judge's opinion, not officially reported, is set forth in the record at page 28.

Jurisdiction

The decision of the Michigan Supreme Court affirming the trial court's denial of petitioner's motion for leave to

file a delayed motion for new trial was rendered on October 4, 1948 (R. 95). Petitioner's application for leave to appeal was filed November 8, 1949, and, treated as a petition for a writ of certiorari, was granted February 28, 1949 (R. 102). The jurisdiction of this Court rests upon 28 U. S. C. (1948 revision) §§ 1257(3) and 2101(c).

Questions Presented

1. Whether the conviction and sentencing of petitioner for first degree murder without affording him the assistance of counsel, or advising him of his right thereto, was a denial of due process in the circumstances revealed by the record, including the following:

(a) petitioner's sickness at the time of examination, arraignment, and trial;

(b) the haste with which the proceedings were consummated;

(c) the failure to inform petitioner of the consequences of his plea of guilty and of his rights;

(d) petitioner's subjection to a trial as to the degree of his offense, during which he was not apprised of his right to remain silent, the prosecutor was allowed prejudicial latitude in the introduction of evidence, and petitioner was neither informed of nor exercised his rights to cross-examine and to introduce evidence in his behalf.

2. Whether the courts below have adequately considered petitioner's claims that he was held incommunicado, that his plea of guilty was the result of fear and of misrepresentation by state officers as to the sentence he would incur, and that he was otherwise denied due process of law.

Statement of Facts

Certiorari was granted in this case (R. 102) upon an application filed *pro se* and containing in substance the fol-

lowing material allegations: that petitioner, tried for first degree murder in Michigan, was denied the right to assistance of counsel; that in approximately one hour he was arraigned, convicted, and sentenced to life imprisonment; that he was without legal assistance throughout these proceedings and was never advised of his right to counsel; that, though the charge against him was serious and complicated, the court did not explain the consequences of the plea of guilty; that no evidence was introduced in petitioner's behalf at the trial, nor was he advised of his right to cross examine the prosecution's witnesses.

On July 3, 1937, a complaint was filed in the Municipal Court of Kalamazoo, Michigan, charging murder without specification of degree. It alleged (R. 19):

> "On the 2nd day of July, A. D. 1937, at the Township of Pavilion in said County, Charles Quicksall, feloniously, wilfully and of his malice aforethought, did kill and murder one Grace Parker; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan."

On the basis of said complaint a warrant was issued for the arrest of petitioner (R. 20).

In the interim between July 2, the day of the alleged crime, and July 15, the date on which the warrant was returned and filed, petitioner had been a hospital patient under police guard, suffering from a serious gunshot wound in the chest (R. 29, 63, 77). In the proceedings below petitioner alleged in substance, and the record in no way refutes, that during his hospital stay he was bedridden and that pain-killing and sleep-producing drugs were administered (R. 49, 51, 63);[1] that he was without funds (R. 62, 39); and

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[1] Since petitioner was without counsel until present counsel was appointed by this Court, the record made below by petitioner is not complete. The hospital record, for example, was not introduced into evidence. It has been examined, however, and shows that morphine was ad-

that his nearest sources of assistance were a sister and sister-in-law in Ohio (R. 62). The record fairly imports, moreover, that petitioner received no visitors nor had any contact with persons other than police and attendants while in the hospital (R. 10-11, 34, 36, 51, 62, 63).

On July 15, 1937, petitioner, while still very sick (according to his repeated and unchallenged protestations to the trial court during the hearing on his 1947 motion for new trial; see *infra*), was taken from the hospital to the Municipal Court of Kalamazoo, where he waived examination and was bound over for trial (R. 23). The Calendar Entries show that the next morning, July 16, 1937, at 9:30 A. M., petitioner was arraigned, and his plea of guilty was accepted by the court (R. 1). At 10:45 the same morning "Proofs [were] taken and respondent sentenced to Southern Michigan State Prison at Jackson and there [to] be confined in solitary confinement at hard labor for the rest of his natural life" (*ibid*).

The language of the information upon which said arraignment was based was identical with that of the complaint, *supra*, charging murder without specification of degree (R. 17-18).

Throughout these proceedings, petitioner was at no time offered counsel, informed of his right to counsel, or advised by counsel. Neither did he waive counsel.

The only evidence in the record regarding the circumstances of the alleged killing of Grace Parker was elicited during the examination of four prosecution witnesses and the colloquy between petitioner and the judge at the hearing to determine the degree of murder (R. 64 *et seq.*). Such hearing is required by Michigan law after a plea of guilty

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ministered, and that petitioner was not allowed to sit up in a chair until July 12. It further shows that when he left the hospital, he was discharged as "improved," not as "recovered."

to a charge of murder, Michigan Penal Code, § 318 (Mich. Stats. Ann. § 28.550); *People* v. *Martin*, 316 Mich. 669.

It should be noted that of the 18 witnesses endorsed on the information (R. 18) only four were called to testify, and that there was no cross-examination of these four prosecution witnesses and no attempt to elicit evidence in petitioner's behalf. Nor was petitioner informed of his rights in these regards.

The statutory examination on degree of murder began with the swearing of Horace R. Cobb as the first prosecution witness. At this point the trial judge interrupted to state that he had accepted petitioner's plea of guilty "to a charge of murder" after having ascertained from petitioner "the details of this homicide as claimed by him" and after having satisfied himself that the plea was made "freely, understandingly and voluntarily" (R. 64-65).

The judge made no mention, at this or any other time, of having informed petitioner of the consequences of his plea of guilty, or of any of his rights in the premises. Moreover, the clear import of the record is that the judge did not so inform petitioner.

The examination of Cobb elicited that he was one of the county coroners, that he had performed an autopsy on the body of the deceased, and that he had ascertained death to have been caused by a bullet entering the chest from the front and passing through the heart (R. 65-66).

Mrs. Jessie Pierce, the next prosecution witness, testified that she was a neighbor of the deceased and that the deceased was her best friend. In response to a question by the prosecutor as to whether she had not had "something called to your attention * * * about some trouble that had happened over at the Parker cottage," Mrs. Pierce answered that Mrs. Parker had said to her on the morning of July 2 that she "wanted to have a showdown with this

party" (petitioner) and that "she was going to forbid him to come around there" (R. 67-68).

Mrs. Pierce then testified that petitioner had been living with the deceased and her husband until a few days prior to July 2; that the deceased's daughter had come to the witness on the morning of July 2 and "said that Charley wanted to see" her; that she went to the Parker place "around 10:30 or 11" and "he [Charley] wanted to know if I would go to the neighbor's and call up and get a case of beer," but that she refused to do so "because we didn't believe in it." She further testified that "everything was peaceful over there then," but that later Mrs. Parker's daughter, who had just been sent by the witness to the Parker cottage to "get her mother to come over and have lunch with us," "came screaming out and told me that Charley had shot her mother" (R. 68-69).

After receiving this information, Mrs. Pierce testified that she started over to the Parker home, heard a shot, turned around and went instead to a neighbor's and had her call the police, and then "went back to Mrs. Parker's" (R. 70). A Mrs. Ketter was there when she arrived, and someone else "but I don't know who it was" (R. 70-71).

Mrs. Pierce said that she spoke to Mrs. Parker, having to "talk to her quite a few times before I could get an answer out to her, and then I repeated two or three times and I asked her who shot her, and she said 'Charley did' " (R. 71). The witness further testified that "I didn't know she was quite so bad, and she said 'No, Jessie, I am going because it is all muddy water before my eyes' " (R. 71-72). This last statement of Mrs. Parker was apparently not made until some time after the assertion [illegible] who had shot her.

In regard to the condition of [illegible]ioner at the time, Mrs. Pierce said that he "was lying o[illegible]he floor shot," with a

wound in the center of his body "over the stomach," and that he "was moaning and groaning and after that he was quiet" (R. 72).

Mrs. Pierce also testified as to the position of the wounded people in the room, Mrs. Parker on the bed and petitioner "not quite a foot from the bed" (R. 73). During her testimony she identified a small revolver as one she had seen lying on the bed (R. 71, 73).

The prosecution next swore Mrs. Cora Ketter, another neighbor of the deceased, who said she had gone to the Parker cottage after hearing from Mrs. Pierce that there was trouble there; she observed no one in the Parker cottage besides Mrs. Parker and petitioner; "Mrs. Parker was lying on the bed and Mr. Quicksall was lying on the floor" beside the bed; each had been shot on the left side; Mrs. Pierce had asked Mrs. Parker who shot her and she had said "Charley"; Mrs. Parker had later "made the remark that she was going to die" (R. 73-75).

Mrs. Ketter stated that petitioner was unconscious all the while she was in the Parker cottage (R. 75).

Charles Conner, a deputy sheriff of Kalamazoo County, was the fourth and last prosecution witness. He testified that he had gone out to the Parker cottage with Mr. Parker, the husband of the deceased, in response to a report from Parker, and that they arrived "right close to noon" (R. 76).

His testimony included the following: "We found Mrs. Parker lying on the bed, and immediately adjacent to the bed on the floor was Charles Quicksall"; each of them had a bullet wound in the left chest and was unconscious; "Doctor Gelding was there and handed me a gun wrapped in a handkerchief, saying that he had picked it off the bed"; the witness assisted in getting Mrs. Parker on a stretcher and out of the house, and then "went over to call for the police ambulance to come to get Quicksall" (R. 77).

Conner then testified to having found a note "on the dresser in the bedroom" (R. 77). This note was immediately offered in evidence (R. 77-78):

> "Mr. Tedrow: We wish to offer this in evidence, your Honor.
>
> "The Court: Do you know anything about the handwriting?
>
> "Mr. Tedrow: It is signed.
>
> "The Court: You may read it into the record.
>
> "Mr. Tedrow (Reads): 'July 2, 1937. I am dying, Grace and I together, because we cannot live apart. Charles Quicksall.'"

There was no further testimony from any of the witnesses regarding the above note, except for statements by Mrs. Pierce that she had not seen any such note in the Parker cottage (R. 69, 73).

The prosecutor having rested, the trial judge abruptly addressed petitioner (R. 88):

> "All right, Quicksall, you may stand up here."

The judge proceeded to recount his version of an unreported previous interview with petitioner, and to elicit affirmances by petitioner of the correctness of the judge's remarks. This colloquy began with the following assertion and response (R. 88):

> "Q. • • • That you were born in Mansfield, Ohio, in 1893; left school in the eighth grade at the age of sixteen; that you have been a laborer and a cook most of your adult life; that you lived in the home of Mr. and Mrs. Parker in Toledo before coming to Kalamazoo; that they moved to Kalamazoo in 1935, and that you came here with them; is that right?
>
> "A. Yes, sir."

Similar affirmances were then given to the judge's statements that petitioner had been twice married and divorced;

had been "convicted in this Court of breaking and entering and sentenced by this Court to Jackson" in 1932; and, after coming to Kalamazoo with the Parkers in 1935, had been arrested and taken back to Ohio on a non-support charge under which he was convicted and sentenced to from one to three years (R. 88-89). After serving the Ohio non-support sentence, petitioner returned to Kalamazoo, resumed his abode with the Parkers, and, as the judge put it, "became intimate" with Mrs. Parker [2] (R. 89).

The trial judge then elicited "yes, sirs" to the following recitals: that three years before the shooting "you and Mrs. Parker made an agreement that if you and she ever got caught in your unlawful intimate relationship that you would die together"; that about a week before the shooting petitioner had left the Parkers "upon the insistence of Mr. Parker"; that he had secured a job at a nearby filling station; that the night before the shooting he drank beer with the Parkers at a beer garden and Mrs. Parker had asked him to come to her home the following morning, "presumably to go fishing" (R. 89-90).

Petitioner similarly affirmed the judge's statements that "you went to her home the following forenoon; her husband was absent, of course?" "You told me that you took six bottles of beer with you?" "And you and Mrs. Parker drank the six bottles of beer?" (R. 90). The judge did not ask, and there is nothing in the record to show, how much liquor was drunk in addition to the beer petitioner brought, nor what effect the drinking had on the parties and the events of the fatal morning.

Affirmances were subsequently obtained to the following statements: that Mrs. Parker had told petitioner "her hus-

[2] "Q. That thereafter, if not before, you and Mrs. Parker became intimate?
"A. Yes, sir.
"Q. Probably before, wasn't it?
"A. Yes, sir." (R. 89).

band was talking about leaving her and getting a divorce"; that "she then asked you to keep your agreement with her that you and she should die together"; that she then produced a revolver and "at her request you picked it up and shot her"; and that petitioner then shot himself (R. 91).[3]

At the conclusion of the "interrogation" of petitioner, the trial judge determined the crime committed to have been that of murder in the first degree, and sentenced petitioner to life imprisonment (R. 92-93). In finding the homicide to have been deliberate and premeditated, as required by the statute on first degree murder (Penal Code, § 316 [Mich. Stats. Ann. § 28.548]), the judge relied heavily on the colloquy with petitioner regarding a "suicide pact" (R. 92).

On April 18, 1947, approximately ten years after his confinement under the above conviction and sentence had begun, petitioner filed, in proper person, a motion for leave to file a motion for new trial. This motion (R. 33-35), prepared in prison, set forth as reasons for a new trial that petitioner was not guilty of the offense charged against him (R. 33, par. 3); that he had been denied the right to assistance of counsel (R. 33, par. 4); that his plea had been entered "because of misunderstanding, through the effect of misrepresentation" (R. 33, par. 4); and that while in custody he had been denied the right to consult with counsel, friends, or relatives, or to call them by telephone (R. 34, par. 1).

In the affidavit (R. 35-39) accompanying this motion, petitioner alleged facts in support of the above grounds for new trial, including the following: that he had tried while at the hospital to use the telephone to reach friends and relatives in order to get help and counsel but was denied such right (R. 36, par. 3); that the sheriff and prosecutor had told him he had better plead guilty and that if he did he would receive a sentence of only two to 15 years (R. 36, par. 4); that the

[3] In the 1947 proceedings on motion for new trial, petitioner denied that he shot either Mrs. Parker or himself (R. 48, 59).

prosecutor had informed him he was in danger of having acid thrown in his face by the husband of the deceased (R. 36, par. 5); that he was taken from the hospital on July 15, 1937, to the Municipal Court for preliminary examination, and the following day taken into the Circuit Court where the prosecutor said "Your Honor, Charley wants to plead guilty and get this over with" (R. 37, par. 2); that in approximately one hour he was tried, convicted, and sentenced (R. 37, par. 2); that he was not informed that if he pleaded guilty he would be sentenced to life imprisonment (R. 37, par. 3); that his plea of guilty was caused by fear and by the aforesaid misrepresentation (R. 37, par. 4); and that his failure to appeal and his delay in moving for a new trial was occasioned by lack of funds, and by the necessity of making arrangements to secure funds, a transcript and other papers, and assistance in preparing his cause—all of which involved extensive correspondence (R. 38-39).

On the basis of the above motion and affidavit, the trial judge (the same judge that had originally convicted and sentenced petitioner, since deceased) granted a hearing (R. 46 *et seq.*). At this hearing the petitioner said (R. 48):

> "Well, in the first place, I wasn't guilty of the crime that I was charged with, of first degree murder. I was under the impression when I pleaded guilty that I was to plead guilty to manslaughter. That was what was promised me in the hospital at the time I was there, and if I had knew I was going to be charged with the crime of first degree murder, I sure never would have pleaded guilty."

The petitioner further stated (R. 48-49):

> "Then he tell me—the Prosecutor and he both tells me that they had such an awful hard time of keeping Mr. Parker from coming in and throwing acid on me, and naturally they put more fear into me than what it was, lying there [in the hospital] with a bullet in me,

pretty sick, so when they said if I would consent to plead guilty to manslaughter that they would see that I wouldn't get more than two years—or less than two years or more than fifteen, I figured that would be the best way out and consented. *When I got into Court Mr. Tedrow—he pleaded guilty for me. I never opened my mouth, but I still under the impression that I was getting charged with manslaughter until the Court read off the sentence.*" (Emphasis supplied.)

The printed record discloses the following with reference to the 1947 hearing (R. 61):

"(Charles W. Struble and Harry Ryskamp were here sworn as witnesses and testified.)"

This record does not contain the testimony of either of these persons; nor does it contain a narrative statement or summary of their testimony. Nor does it state by whom or for what purpose they were called. However, the trial judge, in his opinion denying the motion of petitioner, relied on the testimony of these two persons and referred to it (R. 29, 32). Furthermore, the Michigan Supreme Court relied on the testimony of these persons in its opinion. It referred to the Ryskamp testimony, saying that it was "disclosed by the record" (R. 98). It paraphrased the Struble testimony at some length (R. 99). We are informed that the Justice who wrote the opinion of the Michigan Supreme Court requested and secured from the trial court a typewritten copy of this testimony. The testimony of Ryskamp and Struble is set forth in the response of the Solicitor General of Michigan to the application for certiorari (Response, pp. 18-22). It would appear that the testimony of these two persons is not a part of the record in this case. Perhaps this testimony should be referred to here, so that the Court may be informed with respect to it, if consideration thereof is deemed appropriate.

The testimony of Ryskamp, one of petitioner's guards at the hospital, in so far as material to the present issues, was as follows (Response, p. 22):[4]

> "* * * I was unable to get much information from prisoner until about 5 A. M. [July 3, 1937, the morning after the shooting]. He then apparently felt better after his night's rest and seemed willing to talk as follows: 'How long will I have to lay here? I wish * * * it had taken effect on me like it did on her. If I get over this it will mean life for me anyway.' * * * He then had a bad coughing spell, so I stopped questioning him * * *."

This testimony was relied upon in the opinion of the trial judge denying petitioner's motion, to show that petitioner "well realized that he was guilty of murder and that he would be sentenced for life" (R. 29, 32).

The testimony of Struble, the sheriff, (Response, pp. 18-21), bore on two claims of petitioner: that he had been denied an opportunity to have visitors or to use a telephone or otherwise contact friends in order to get a lawyer, and that his plea of guilty was the result of fear and of misrepresentation as to the sentence which would be imposed. As to the first of these claims, Struble said that he had no knowledge of anyone informing petitioner that he could not have visitors, use a telephone, or otherwise obtain assistance necessary to getting counsel. It is pertinent to note that this testimony did not contradict petitioner's earlier assertion at the hearing that he asked one of his guards at the hospital if he "could have somebody call up for me," but "He says he wasn't allowed to let anyone in to visit me, talk to me or use the telephone" (R. 51). Following this assertion, the trial judge asked (*ibid.*):

> "Q. Who was that?
> "A. The deputy sheriff.

[4] Ryskamp, although his name was endorsed upon the information, was not called as a witness in the 1937 proceedings.

"Q. Who was it?

"A: I don't know his name. This gentleman here was on in the evening, but I don't recall who the man was in the day time.

"Q. Mr. Ryskamp was on in the evening?

"A. Yes, sir.

"Q. How many hours,—eight hours?

"A. I couldn't say. I was asleep most of the time. They give me shots to put me to sleep. I couldn't call anybody."

In the same vein, petitioner further stated (R. 63):

"Your Honor, I couldn't get in touch. I couldn't get out of bed and use a telephone. I asked to have somebody call, but—I don't know who gave the order, but the man that was on guard told me it was the Prosecutor and Sheriff."

The trial judge made no effort to ascertain who petitioner's day guard at the hospital had been so that he might be questioned, though certainly either Struble or Ryskamp had this information available.

The testimony of Struble concerning petitioner's claim of misrepresentation was as follows (Response, pp. 19-20):

"Q. [by the trial judge]. He says in his affidavit that he was advised by the Sheriff and Prosecuting Attorney that he better plead guilty to the charge of manslaughter, and that he, the Prosecuting Attorney, would see that he automatically would receive a sentence of two to fifteen years. Did you ever hear of anything like that?

"A. I never did.

. . . . . .

"Q. He says under oath that he was not informed by the Sheriff or Prosecuting Attorney that if he entered a plea of guilty he would be sentenced to life imprisonment. Of course you didn't know what he would be sentenced?

"A. I didn't know."

The trial judge asked no other questions regarding what representations, if any, were made to petitioner by the sheriff or in his presence. The sheriff admittedly had talked to petitioner before the plea of guilty (Response, p. 18). The trial judge in his opinion denying petitioner's motion did not rely upon Struble's testimony as controverting petitioner's claims of misrepresentation.

Petitioner's brief cross-examination of Struble included the following (Response, pp. 20-21):

> "Q. Mr. Struble, when I was in the hospital you recall the story of the acid—coming up there and throwing acid in my face?
>
> "A. Such a report, yes."

The prosecutor, Tedrow, was not available for examination upon the hearing, because of a very recent paralysis depriving him of the power of speech (R. 49).

Repeatedly, during the hearing on the motion, petitioner called to the trial judge's attention the fact that during the 1937 trial he had been a very sick man, physically and mentally unable to follow the proceedings or to defend himself.

Thus, in response to a question by the judge as to whether the information charging murder had been read to him in the original proceedings, he said (R. 50):

> "I am sure I don't really know. I am telling you the honest truth. I came out of the hospital right to the county jail and from there to the Municipal Court and from there up here. I was very sick when I came into your courtroom."

And again (R. 51):

> "A. • • • I was asleep most of the time [in the hospital]. They give me shots to put me to sleep. I couldn't call anybody.

"Q. Well, you weren't asleep when you were in this Court?

"A. I was very sick, your Honor. I was probably not asleep, but very sick."

And again (R. 55):

"A. I didn't have an [sic] comment, your Honor, to anything."

And again (R. 56):

"A. I was pretty sick, as I explained to you."

And again (R. 58):

"A. I sure must have been out of my head when I was telling—answering those questions."

The trial judge gave no apparent consideration to this alleged incapacity of the petitioner, either at the hearing on the motion or in the opinion (R. 28-33) he rendered in denying the motion.

Several times during the 1947 proceedings, at the hearing and in moving papers, petitioner protested his innocence of the crime for which he was convicted (R. 9, 13, 14, 33, 35, 36, 37, 38, 48). At one point he told the trial judge of an interview occurring while he was in the hospital, during which he had insisted to the prosecutor and sheriff, in the face of their pressing accusations, that the shooting was an accident and that he "never even had hold of the gun" (R. 48).

The hearing on the motion concluded with the following (R. 63):

"The Court: * * * I can't decide it this moment. I will give it time and dispose of it. I would like to see the opinion of the Supreme Court in the Adrian case. [The reference is to *DeMoerleer v. Michigan*, 329 U. S. 663.] It hasn't come through yet in the advance sheets

and I would like to see it before I dispose of this, because as I view this, that is the only possible question that could be worthy of serious consideration in this case, would be that you pleaded guilty and were sentenced the same day. You were not denied the right of counsel; nothing in the history and the record in this case to show that you were denied an opportunity——

"Defendant (Interrupting): Your Honor, I couldn't get in touch. I couldn't get out of bed and use a telephone. I asked to have somebody call, but—I don't know who gave the order, but the man that was on guard told me it was the Prosecutor and Sheriff.

"The Court: How long had you been out of the hospital when you were brought into this Court?

"Defendant: I left the hospital on the 15th; the following day.

"The Court: Well, is there anything further that you know of Mr. Barber?

"Mr. Barber [apparently the prosecutor]: No, sir.

"The Court: All right. Well, then that concludes our hearing and he may be returned to Jackson and I will dispose of this within a few days and mail you a copy of the Court's opinion, whatever it is. All right."

In his opinion denying the motion, the trial judge said (R. 32):

"Even now Defendant offers no denial of having killed Mrs. Parker. The proposed motion to vacate judgment has no merit.

"Having in mind the decision of the United States Supreme Court reversing the Michigan Supreme Court in People vs. DeMeerleer, it cannot be seriously urged that this Defendant did not understand the consequences of his plea of guilty. Neither can it be said that there was any confusion in his mind. His answers to the Court's questions dispose of that. The charge of murder is serious indeed, but there is nothing complicated about killing a woman by gunshot."

An appeal from this denial of his motion was taken by the petitioner, *pro se*, to the Michigan Supreme Court. In

his Reasons and Grounds for Appeal (R. 9-11) and in the accompanying affidavit (R. 12-15), both of which papers were filed July 22, 1947, the petitioner set forth in substance the same grounds previously presented to the trial court. Included were the following allegations:

> "* * * the trial Court failed to advise Defendant of the consequences of his plea and did not advise defendant of the difference between first degree Murder, second degree Murder and Manslaughter * * *" (R. 10, par. 3);
>
> "* * * he had no counsel to inform him of the nature of the degree to which he was pleading to and that at no time prior to the entering of such plea, did he receive any explanation of the nature of the penalty provided by law, for such offense, and had no knowledge of the effects that his plea of guilty would have on his life and liberty. Had he been informed of the nature of the degree or offense of which he was charged, Deponent could not, and would not have entered a plea of guilty" (R. 12-13);
>
> "* * * he was not apprised by the trial Court of the fact that he had Constitutional Rights, and that he doesn't have to answer any questions that would involve him in the alleged crime of which he was being tried" (R. 13, par. 2).

In affirming the decision below, the Michigan Supreme Court said (R. 100):

> "In determining whether one convicted of crime has been denied his constitutional rights in the manner above indicated, it is necessary in each instance to give careful consideration to the factual background of the particular case. [Quoting from *Wade v. Mayo*, 334 U. S. 672, and *Betts v. Brady*, 316 U. S. 455.]
>
> "We have already outlined quite in detail the factual background of the instant case; and under the circumstances disclosed by this record we are convinced that

defendant was not deprived of any of his constitutional rights."

The court stated in conclusion (R. 102):

"After a careful consideration of the various contentions made by defendant, we are brought to the conclusion that there is no merit to his motion for leave to make a delayed motion for a new trial. The holding of the circuit court to that effect is affirmed."

Summary of Argument

I. Petitioner's claim that he was denied due process of law in contravention of the Fourteenth Amendment was made in the courts below and was decided on the merits by them; and it has been made in this Court. The denial of the claim by the Supreme Court of Michigan is properly before this Court for review.

II. The conviction and sentencing of petitioner for first degree murder without affording him the assistance of counsel was a denial of due process under the circumstances disclosed by the record.

Whether or not the right to an offer of counsel exists as a matter of law in every first degree murder case, the present record clearly demonstrates that the proceedings resulting in petitioner's conviction and sentence, in which petitioner was without counsel, and was not advised of his right to counsel, constituted a denial of due process.

A. Petitioner was poorly educated, inarticulate, uninformed as to legal rights and procedure, and without funds or help. He was physically and mentally incapable of exercising his limited capacities at the time of preliminary examination, arraignment, trial, conviction, and sentence. From the day of the alleged crime to the day of his examination, a period of two weeks, he had been confined in a hospital, as a prisoner, suffering from a serious bullet wound. Drugs had

been administered to ease the pain. It is clear from the record that he was neither physically nor mentally capable of defending himself in the proceedings.

B. Petitioner was rushed through examination, arraignment, conviction, and sentence, and was denied a fair opportunity to meet the charge against him.

It is a fundamental principle of due process that the accused in a criminal case must have a reasonable opportunity to obtain the assistance of counsel and to prepare his defense. Obviously in the instant case the petitioner never had such opportunity because he was physically and mentally incapable of so acting and there were no friends to assist him throughout the period of his confinement in the hospital and at the very time of his examination, arraignment, trial, conviction and sentence.

He was taken from the hospital to his examination. The very next day, in little more than an hour, he was arraigned, was compelled to plead and to go through a technical trial concerning his degree of guilt, and was convicted and sentenced.

The proceedings in this matter consumed much less time than the similar proceedings in *DeMeerleer* v. *Michigan*, 329 U. S. 663, wherein undue judicial haste was one of the grounds upon which this Court relied. Moreover, the facts noted above concerning petitioner's condition and circumstances, render the extreme speed even more prejudicial, effectively denying petitioner a fair opportunity to meet the charge against him.

C. Petitioner pleaded guilty without advice as to the consequences of his plea, the nature of the charge against him, possible defenses thereto, or any of his related rights.

The record shows that the trial judge failed to advise petitioner as to these matters. Also it affirmatively appears that the trial judge thought it sufficient that petitioner knew

that the charge against him was murder (even though the degree of the offense had not been specified in the information). The trial judge clearly underestimated the advisory duties owed an uncounselled defendant in a first degree murder case.

D. In Michigan, it is mandatory after a plea of guilty to a charge of murder, that the trial court proceed to a determination of the degree of the crime on the basis of testimony taken in open court. Penal Code, § 318 (Mich. Stats. Ann. § 28.550); *People* v. *Martin*, 316 Mich. 660.

As in *DeMeerleer* v. *Michigan*, 329 U. S. 663, petitioner suffered grave prejudice in the course of this statutory hearing, by reason of ignorance and lack of assistance from counsel or court. He was deprived of his right not to be a witness against himself. The prosecutor was allowed complete and prejudicial freedom in examining the four witnesses he chose to call from among the 18 endorsed on the information. Incompetent evidence was admitted. There was no cross-examination of the prosecution witnesses and no introduction of evidence in petitioner's behalf. The trial judge at no time apprised petitioner of any of his rights, nor made any effort to protect his interests.

The errors committed were of the same nature as those prompting reversal in *Gibbs* v. *Burke*, 337 U. S. 773.

E. At the hearing on petitioner's motion for leave to file a delayed motion for a new trial, petitioner contended, among other things, that he had been held incommunicado, and that his plea of guilty was brought about by misrepresentations as to the sentence which would follow. The trial judge made no adequate inquiry into the validity of these claims.

III. There are no facts in this case which would establish that petitioner waived his right to counsel under the stand-

ards which this Court has announced. See *Johnson* v. *Zerbst*, 304 U. S. 458, *Von Moltke* v. *Gillies*, 332 U. S. 708. The trial court did not find that petitioner waived his right to counsel; and though the opinion of the Michigan Supreme Court contains some language which might be regarded as a vague intimation of possible waiver, there was no actual holding of waiver. Clearly the circumstances do not constitute waiver.

IV. The courts below applied improper standards in determining whether or not petitioner was denied due process. Moreover, they seemed intent upon matters pertaining to the question of guilt, rather than as to whether due process was observed.

Argument

I. *Petitioner's Claim of Federal Right was Properly Made Below and is Properly Before this Court*

In the courts below, petitioner made the basic claim that he had been denied counsel in violation of his rights under the Fourteenth Amendment. The claim was presented in the form of a motion for leave to file a delayed motion for a new trial, this being the approved state procedure and precisely the same as that employed in *DeMeerleer* v. *Michigan*, 329 U. S. 6[illegible], reversing 313 Mich. 548. Both the trial court and the Michigan Supreme Court decided the motion on the merits.

In his application for certiorari, petitioner has presented the same basic claim. Technical oversights or inadequacies in the petition should be liberally regarded in view of petitioner's layman-pauper-prisoner status at the time he drafted and filed it. *Tomkins* v. *Missouri*, 323 U. S. 485, 487; *Price* v. *Johnston*, 334 U. S. 266, 292; *Rice* v. *Olson*, 324 U. S. 786, 791-92.

II. *The Conviction and Sentencing of Petitioner for First Degree Murder Without Affording Him the Assistance of Counsel was a Denial of Due Process Under the Circumstances Disclosed by the Record*

This Court has never held that an indigent accused charged with murder does not have the right to an offer of counsel. See *Tomkins* v. *Missouri*, 323 U. S. 485; *DeMeerleer* v. *Michigan*, 329 U. S. 663; *Hawk* v. *Olson*, 326 U. S. 271; *Marino* v. *Ragen*, 332 U. S. 561; *Carter* v. *Illinois*, 329 U. S. 173 (wherein the majority held the accused to have waived counsel); *Avery* v. *Alabama*, 308 U. S. 444 (wherein the Court held that counsel had been effectively appointed). Only in the *Avery* case had the accused been sentenced to death.

It is not clear whether the right to an offer of counsel in such cases is predicated upon an application of the doctrine of *Betts* v. *Brady*, 316 U. S. 455, or upon the recognition of an absolute right to such an offer where the crime charged, *viz.*, murder, is subject to capital punishment. Recent decisions contain language suggesting the right to be an absolute one in capital cases. See *Bute* v. *Illinois*, 333 U. S. 640, 676, 680 (wherein both the majority and minority opinions cite, among other cases, *DeMeerleer* v. *Michigan, supra*, for the "absolute right" proposition, despite the fact that Michigan does not permit capital punishment for first degree murder); *Uveges* v. *Pennsylvania*, 335 U. S. 437, 440-41; *Townsend* v. *Burke*, 334 U. S. 736, 739. Perhaps in citing the *DeMeerleer* case as above indicated in the *Bute* opinions, the Justices had in mind that first degree murder is the crime most typically resulting in capital punishment, and therefore, for the purpose of determining right to counsel, is to be treated as a "capital offense."

It is submitted that where an indigent layman is tried for first degree murder, the gravity and complexity of the charge render the lack of counsel implicitly unfair.[5] In the present case, however, unfairness to petitioner is not merely implicit; it stands out starkly in the record as revealed below.

A. *Petitioner, an Indigent Laborer, Physically Sick, Spiritless, and Uninformed, was Unable Adequately to Protect His Own Interests at the Time of Arraignment, Conviction, and Sentence*

Mr. Justice Reed, speaking for the Court in *Gibbs* v. *Burke*, 337 U. S. 773, stated (at 780):

> "Our decisions have been that where the ignorance, youth, or other incapacity of the defendant made a trial without counsel unfair, the defendant is deprived of his liberty contrary to the Fourteenth Amendment. Counsel necessary for his adequate defense would be lacking."

Both "ignorance" and "other incapacity" were present in this case.

The record clearly indicates that petitioner was uneducated, inarticulate, and uninformed as to legal rights and procedure. He was without funds (R. 39, 62). He "left school in the eighth grade at the age of sixteen," and was a "laborer and a cook" most of his adult life (R. 88). It is illuminating that after ten years in prison, during which he had studied and improved himself, he still was unable to express himself with clarity.

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[5] The Supreme Court of Michigan has recognized the soundness of this principle, and even gone beyond it, by adoption of Rule 35A (318 Mich. xxxix-xl), effective September 1, 1947, which prospectively provides that upon any charge of felony the trial court "shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him." Rule 35A, Section 1.

These shortcomings were extremely aggravated by the fact that petitioner was taken from a hospital bed into court, while physically and mentally debilitated. The record discloses the following facts in regard to petitioner's condition at time of trial:

On July 2, 1937, petitioner was seriously wounded by gunshot near the center of the chest, above the abdomen (R. 72, 75, 77). When found, he was unconscious (*ibid.*). He was taken to the hospital the same day as a police prisoner, where he remained until July 15, 1937, when he was taken to the Municipal Court of Kalamazoo for preliminary examination (R. 29, 37, 50, 63). The next morning, July 16, he was arraigned, convicted, and sentenced.

The record of these proceedings does not show a word spoken by petitioner until he was ordered to stand before the bench for interrogation by the judge (R. 88). During that long interrogation, he answered typically "yes, sir," without more, to the judge's leading questions. His utter passivity frames a picture of an untutored layman, unaware of defenses against a complicated charge or of distinctions between degrees of included offenses, and too sick to venture opposition.

There is nothing in the record to suggest that anyone, at the time of the 1937 proceedings, made any effort to ascertain whether petitioner was in satisfactory physical or mental condition to safeguard his own interests in court. Such physical condition as permits discharge from a hospital (particularly of a police prisoner) is a very different thing from that physical well-being essential to defense of one's rights in court. And the difference becomes the greater where the accused is an uneducated laborer who in the best of health is without knowledge as to his rights, and therefore has little more with which to defend himself than the will to resist, in this case wholly sapped.

Time and again at the 1947 hearing on his motion, petitioner directed the trial judge's attention to his sickness during the 1937 proceedings. Thus, in response to the judge's question as to whether the information had been read to him on his arraignment, petitioner said (R. 50):

> "I am sure I don't really know. I am telling you the honest truth. I came out of the hospital right to the county jail and from there to the Municipal Court and from there up here. I was very sick when I came into your court room."

And again a few moments later petitioner said (R. 51):

> "• • • I was asleep most of the time. [Referring to the time in the hospital.] They give me shots to put me to sleep. • • •
>
> "Q. Well, you weren't asleep when you were in this Court?
>
> "A. I was very sick, your Honor. I was probably not asleep, but very sick."

And again (R. 55):

> "Q. Then you remember the Court asking you: 'Have you any comment to make upon any of that testimony? A. No.' You remember saying you had no comment to make?
>
> "A. I didn't have an [sic] comment, your Honor, to anything."

And in response to another question by the court (R. 56):

> "I was pretty sick, as I explained to you. Maybe I didn't hear it."

And again (R. 58):

> "I sure must have been out of my head when I was telling—answering those questions."

In spite of these repeated assertions by petitioner as to his condition when arraigned and sentenced, and as to

the effect of such condition on his capacity to understand and protect his interests, the trial judge neither inquired into the facts nor made any findings upon the question. Apparently he ignored the claims because he considered them irrelevant (see R. 32, 62).

The Michigan Supreme Court, before whom petitioner never appeared, the case being presented on briefs alone, likewise ignored the claim of incapacity due to illness, and its relevance in applying the doctrine of *Betts* v. *Brady*, 316 U. S. 455. Thus, it stated in its opinion (R. 97):

> "The record made at that time [conviction and sentence] *and particularly his attitude and conduct in court in this later hearing* disclosed that he was a man of fairly keen intellect and not one who by reason of youth or adverse circumstances should have his rights carefully protected by the appointment of counsel, which, as above noted, was not requested." (Emphasis supplied.)

Obviously, the Michigan Supreme Court gave no consideration to the claims of petitioner as to his physical condition at the time of the 1937 proceedings; nor can petitioner's "attitude and conduct in court" in 1947 throw significant light upon his mental condition and capacity to defend himself ten years earlier when he was not only extremely sick and spiritless, but also less aware of his rights.

The logical and necessary implications of the test evolved by this Court for determination of the right to counsel require that physical capacity as well as mental capacity at the time of trial be the subject of inquiry. See, *e.g.*, *Gibbs* v. *Burke*, 337 U. S. 773, 780 (quoted *supra*, this section); *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; *Townsend* v. *Burke*, 334 U. S. 736, 739; *Rice* v. *Olson*, 324 U. S. 786, 788-89. In fact, no investigation of the one which ignores the other would be consistent with accepted medical principles.

We submit that in view of the nature and seriousness of petitioner's wound, the shortness of his stay in the hospital, the fact that he was taken directly from the hospital into court, and his unchallenged assertions below of sickness and incapacity at the time of the 1937 proceedings, petitioner was denied due process by reason of the failure to offer him counsel.

If this Court should be of the opinion that the facts as to petitioner's 1937 condition do not sufficiently appear from the record, then we submit that this matter should be remanded to the state courts for explicit findings as to petitioner's physical condition at the time of arraignment and sentence, and as to the effect thereof on his capacity to defend himself against a charge of murder.

B. *Petitioner Was Rushed Through Examination, Arraignment, Conviction, and Sentence, and Was Denied a Fair Opportunity to Meet the Charge Against Him*

The record in this case establishes that the petitioner was taken on July 15, 1937, from the hospital to the Municipal Court for preliminary examination. Upon appearing before the Municipal Court, examination was waived.

The very next day, July 16, 1937, he was arraigned in the Circuit Court; a plea of guilty was entered for him; the judge conferred with him in chambers; a hearing in open court was had and testimony was taken on the degree of guilt; and upon the conclusion of this hearing the court sentenced petitioner to solitary confinement at hard labor for the rest of his life. All these proceedings took place on the morning of July 16th. In the calendar of the Circuit Court the following entries appear under date of July 16 (R. 1):

> "9:30 A. M. Arraigned and information read by Prosecuting Atty. Respondent pleaded guilty to First

Degree Murder. Plea accepted by the Court and respondent remanded without bail.

"10:45 A. M. Proofs taken and respondent sentenced to Southern Michigan State Prison at Jackson and there be confined in solitary confinement at hard labor for the rest of his natural life."

Thus in little over an hour all these proceedings were commenced, carried out, and concluded. This fact also appears in the affidavits of petitioner (R. 12, 37) and is uncontroverted.

A defendant is entitled, as a fundamental element of due process, to a "fair opportunity to secure counsel." *Powell* v. *Alabama,* 287 U. S. 45, 53, 68-69. In the instant case petitioner was confined to the hospital, suffering from a serious bullet wound, bedridden and under the influence of drugs to alleviate pain. He was alone, friendless, and without anyone to help him. Does it need to be stated that a person under these conditions of physical and mental incapacity is not in a position to arrange for counsel and to prepare his defense? Petitioner's preliminary examination before the Municipal Court followed immediately upon his release from the hospital, and then within twenty-four hours all of the proceedings above referred to, down to the final sentence, were carried out. This is a clear case of denial of a fair opportunity to obtain counsel and a fair opportunity to prepare one's defense.

It is also to be borne in mind that during this precipitous, peremptory procedure he was not even advised of his right to secure counsel (R. 51). Such failure to inform an accused has been condemned by this Court in *DeMeerleer* v. *Michigan,* 329 U. S. 663, 664, 665, and other cases referred to in this brief.

In the *DeMeerleer* case the "quick justice" factor was one of the grounds for this Court's reversal of the state conviction. Yet, in that case there was a recess between the plea of guilty and the statutory hearing as to degree

of murder (see *People* v. *DeMeerleer*, 313 Mich. 548, 550),[6] whereas here there was no interruption.

The unfairness to petitioner of such headlong proceedings is aggravated by the facts of his situation at the time of such proceedings. If hasty procedure is unfair to an accused person who is well, it is much more unjust in the case of one who is ill. The petitioner, physically and mentally incapable of helping himself, did not even have an opportunity to secure help from others. The record fairly imports that he had no visitors in the hospital; he said that he was told he was not allowed visitors or use of a telephone (R. 10-11, 34, 36, 51, 63). He had no money (R. 39, 62). Thus, he had no opportunity to plan or prepare his defense. And when the charge, as here, is one of murder, involving all the technicalities of differing degrees, included offenses, subtle defenses, varying punishments, etc. (see *Tomkins* v. *Missouri*, 323 U. S. 485, 488-89, quoted *infra*, Section II, C) the prejudice to an uncounselled accused from such haste is further increased.

It is particularly significant to note the vigilant protection against unreasonable judicial haste accorded by this Court to defendants in state proceedings who have counsel. Thus, in *White* v. *Ragen*, 324 U. S. 760, a *per curiam* decision, it was said (at 763-64):

> "We have many times repeated that not only does due process require that a defendant, on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, [citations omitted] but that *it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel. Powell v. Alabama*, 287 U. S. 45; *Avery v. Alabama*, 308 U. S. 444; *Ex parte*

[6] The recess was approximately four hours. See Brief Opposing Petition for Certiorari, filed by the Attorney General of Michigan in *DeMeerleer* v. *Michigan*, No. 140, October Term, 1946, page 47.

Hawk, 321 U. S. 114, 115-116; *House v. Mayo, supra.*" (Emphasis supplied.)

And in *House* v. *Mayo*, 324 U. S. 42, it was likewise said *per curiam* (at 46):

> "We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition. [Citations omitted.] *It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him.* The fact that petitioner pleaded guilty after the denial of his request for time to consult with his counsel, does not deprive him of his constitutional right to counsel." (Emphasis supplied.)

To the same effect, see *Hawk* v. *Olson*, 326 U. S. 271, 278.

The constitutional protection against unfair rushing of a counselled defendant should apply with even greater force to an uncounselled one. Moreover, an uncounselled accused cannot be expected to appreciate the prejudice to his rights inherent in an unguided rush through arraignment and trial, and therefore to demand pause.

If it be said that the basis for requiring that reasonable time be provided a counselled defendant is that he has a constitutional right to a reasonable opportunity to consult with his lawyer, it is likewise true that an uncounselled defendant has a greater need for a reasonable opportunity to think through his own problems and to determine upon a course of action. It was stated in *Foster* v. *Illinois*, 332 U. S. 134, 137, that "process of law in order to be 'due' does require that a State give a defendant ample opportunity to meet an accusation." Typically, an uncounselled accused has no reliable means for learning the real nature of the accusation against him or the strength of the prosecution's case until he gets into court. He is dependent, for whatever information he gets regarding these matters before he appears in court, upon the very people who will

prosecute him. The record in the present case sharply discloses the dangers inherent in such dependency (see, *e. g.*, R. 48-49). And like other human beings thrust suddenly into relatively strange and threatening circumstances, an uncounselled accused rarely thinks of all matter in his favor at first challenge. He needs time to appraise the charge and case against him, perceive strengths and weaknesses, and overcome reticence. Only then can he understandingly plead and defend his rights in any further proceedings.

The problems confronting an uncounselled defendant as a result of judicial haste are exaggerated in direct ratio both to the accused's ignorance and lack of information, and to the seriousness and complexity of the charge against him. Where the charge is murder and the accused comes to the courtroom from a two-week confinement in a hospital bed because of a serious gunshot wound in the chest, the prejudice from such speed is implicit and gross.

Specifically, the haste in the present case, interacting with the other circumstances revealed by the record, deprived petitioner of an effective opportunity to secure counsel, to consider how he should plead, to prepare his defense upon the statutory hearing as to degree of murder, and to reconsider his plea for the purpose of determining whether he should exercise his right under Michigan law to withdraw his plea of guilty at any time prior to the imposition of sentence. See *People* v. *Martin*, 316 Mich. 669, 673; *People* v. *Vasquez*, 303 Mich. 340, 342, and cases there cited.

C. *Petitioner Pleaded Guilty Without Advice as to the Consequences of His Plea, the Nature of the Charge Against Him, Possible Defenses Thereto, or Any of His Related Rights*

In *Tomkins* v. *Missouri*, 323 U. S. 485, this Court stated clearly the inherent need of an accused for counsel in meet-

ing so serious and complicated a charge as that of first degree murder (at 488-89):

> "The nature of the charge emphasizes the need for counsel. Under Missouri law one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. [Citations omitted.] The punishments for the offenses are different. [Citations omitted.] The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed."

Similarly, in *Hawk* v. *Olson*, 326 U. S. 271, another first degree murder case, it was said (at 278):

> "Homicide has degrees in Nebraska. [Citations omitted.] There are difficulties in the application of the rules. [Citations omitted.] The defendant needs counsel and counsel needs time."

And again in *Williams* v. *Kaiser*, 323 U. S. 471, wherein defendant pleaded guilty to a charge of robbery, the Court said, after pointing out the technical difficulties arising from the fact that the offense charged had degrees (at 475-76):

> "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States*, 315 U. S. 60,

75-76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Very recently, in *Uveges* v. *Pennsylvania*, 335 U. S. 437, the Court said (at 441-42):

"Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair * * * the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. * * *

"* * * The record shows no attempt on the part of the court to make him [petitioner] understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing."

These principles are applicable to this case. Petitioner was charged with the most serious offense short of treason known to Michigan law. The offense has degrees. Michigan Penal Code, §§ 316, 317 (Mich. Stats. Ann. §§ 28.548, 28.549). First degree murder "includes" the lesser offenses of second degree murder and manslaughter. *People* v. *Moshier*, 306 Mich. 714; *People* v. *Mihalko*, 306 Mich. 356; *People* v. *Treichel*, 229 Mich. 303. The criteria by which these three offenses are distinguished are highly technical.

See *People* v. *Holmes*, 111 Mich. 364, 369-74. The penalties vary. Michigan Penal Code, §§316, 317, 321 (Mich. Stats. Ann. §§ 28.548, 28.549, 28.553). The defenses to a charge of murder cover a wide range: *e. g.*, intoxication, *People* v. *Jones*, 228 Mich. 426 (in this connection it should be noted that the record in the present case reveals petitioner and Mrs. Parker to have been drinking at the time of the shootings; R. 29, 90); temporary insanity, *People* v. *Holmes*, 111 Mich. 364.

Not only was petitioner without counsel, but the record clearly shows that the trial judge did not inform him of the consequences of his plea, nature of the charge against him, possible defenses thereto, or of any of his related rights. The judge made only two germane statements while the trial was in progress. The first was interjected after the prosecution had begun its examination of witnesses in the matter of sentence (R. 64-65):

> "Just a minute. The record may show that this respondent has just offered to plead guilty and had [sic] pleaded guilty to a charge of murder; that after a full statement by the respondent in response to numerous questions by the Court in open Court and after a private interview with respondent at chambers, in both of which he has freely and frankly discussed the details of this homicide as claimed by him, the Court being clearly satisfied that the plea of guilty is made freely, understandingly and voluntarily, an order has been entered accepting such plea of guilty. * * *"

The second recital (R. 92), made upon the imposition of sentence, adds nothing here material.

The above-quoted recital falls far short of evidencing such advice by the court to petitioner as to negative the prejudice from want of counsel. But the trial judge's failure to state that he advised petitioner on essential matters is only a small part of the evidence that the judge did not so advise petitioner. The record casts sharp light.

Thus, early in the hearing on his 1947 motion for new trial petitioner asserted that his plea of guilty had been entered in the mistaken belief that he would receive a sentence of only two to 15 years, as on a charge of manslaughter (R. 48, 49). Then, after stating that his advice in this regard had come from the sheriff and the prosecutor while he was in the hospital, petitioner continued (R. 49):

> "When I got into Court Mr. Tedrow [the prosecutor] —he pleaded guilty for me. I never opened my mouth, but I still under the impression that I was getting charged with manslaughter until the Court read off the sentence."

If the trial judge's recital that the plea of guilty had been "understandingly" made was intended by him as a shorthand account of his having apprised the accused of the consequences of his plea, the nature of the charge against him, and of his related rights, it would have been natural for the judge (the same judge that convicted and sentenced petitioner) so to have asserted at this point in the 1947 proceedings. However, neither here nor at any other time during such proceedings did the judge state that he had informed petitioner in these regards or that it was his habit to so inform uncounselled defendants. Instead, he revealingly took another tack (R. 49-51):

> "Q. You were taken into Municipal Court first?
> "A. That is true, your Honor.
>
> * * * * * * *
>
> "Q. And you knew that you were charged with murder?
> "A. Yes, but, your Honor, when they [the prosecutor and sheriff] came to the hospital——
> "Q. (Interrupting): I say you knew that, that you were charged with murder?
> "A. At that time.
> "Q. The warrant was read to you in Justice Court?

"A. It was read to me there and I waived examination.

"Q. On a murder charge?

"A. That is true.

"Q. You knew you were bound over to this Court on a charge of murder?

"A. That is true.

"Q. And when you appeared in this Court the information was read to you stating that you were charged with murder?

"A. I never even heard the Prosecutor mention the charge of murder, your Honor.

"Q. Don't you remember that in this Court the Prosecuting Attorney Mr. Tedrow, stated to you the substance of the information * * * which charged that you Charles Quicksall then, theretofore, to-wit: on the 2nd day of July A.D. 1937, at the Township of Pavilion, County of Kalamazoo, feloniously, wilfully and of his malice aforethought, did kill and murder one Grace Parker. That was read to you right here in this Court, wasn't it?

"A. Your Honor, at the time I came into this Court——

"Q. (Interrupting): Wasn't that read to you?

"A. I am sure I don't really know. I am telling you the honest truth. I came out of the hospital right to the county jail and from there to the Municipal Court and from there up here. I was very sick when I came into your court room.

"Q. You were into the Municipal Court one day and in this Court the following day.

"Q. And the following day you came into this Court and you knew you were charged with murder, didn't you?

"A. That is right."

The trial court here dropped this line of inquiry, apparently content that if petitioner knew he was charged with "murder," no further knowledge on his part was required.

It is not necessary to spell out the respects in which a mere reading to an accused of a technical information (R.

17-18) charging "murder," without even indication as to degree, falls short of such guidance by the trial court as to the consequences of the plea, nature of the charge, possible defenses, and other aspects of the accused's rights as may render the lack of counsel non-prejudicial under the Fourteenth Amendment. Yet, since the trial judge in both the 1937 and 1947 proceedings was the same person, it is unlikely that he had a more sensitive appreciation in 1937 of what was necessary to protect an uncounselled defendant from his own ignorance in pleading guilty to a charge of murder than he had in 1947, ten years later.

The record contains even more conclusive evidence of the trial judge's underestimation of his function in giving aid to an uncounselled murder defendant. In his opinion denying petitioner's motion below, the judge said (R. 32):

> "Even now Defendant offers no denial of having killed Mrs. Parker. The proposed motion to vacate judgment has no merit.
>
> "Having in mind the decision of the United States Supreme Court reversing the Michigan Supreme Court in People vs. DeMeerleer, it cannot be seriously urged that this Defendant did not understand the consequences of his plea of guilty. Neither can it be said that there was any confusion in his mind. His answers to the Court's questions dispose of that. *The charge of murder is serious indeed, but there is nothing complicated about killing a woman by gunshot.*" (Emphasis supplied.)

Taking the elements of the above one at a time, on what did the trial judge rely in stating so conclusively that petitioner understood the consequences of his plea? In the same opinion, the trial judge stated:

> "On July 3rd Defendant said to Mr. Ryskamp [one of his guards at the hospital]: 'How long will I have to lay here? I wish * * * it had taken effect on me

like it did on her. If I get over this, it will mean life for me anyway. * * *" (R. 29)

"Harry Ryskamp, a guard at the hospital, testified upon the hearing of the motion, *as already stated herein, that Defendant well realized that he was guilty of murder and that he would be sentenced for life.*" (R. 32; emphasis supplied.)

There is nothing in Ryskamp's testimony to support the characterization thereof in the last-quoted passage.[7] Furthermore, the duty of a trial judge to inform an uncounselled defendant of the consequences of his plea of guilty to a charge of murder is not dischargeable by vague inferences as to what such defendant may otherwise have known. Nor can expression of fear of a possible life sentence be equated with knowledge that such is the mandatory penalty for first degree murder. The very reliance of the trial judge on such tenuous inference, to support his conclusion that petitioner was aware of the consequences of his plea, itself demonstrates the absence of better support for such conclusion. And even if petitioner knew he was charged with "murder," it cannot be presumed that he therefore knew the consequences of his plea, since the charge did not specify the degree of the offense (R. 17-18), and the statutory penalties for first and second degree murder vary in Michigan. See Michigan Penal Code, §§ 316, 317 (Mich. Stats. Ann. §§ 28.548, 28.549).

As for the trial court's statement that there was no "confusion" in petitioner's mind and that "his answers to the Court's questions dispose of that," it must be remembered that the type of "confusion" which is pertinent to the present inquiry is confusion as to nature of the charge, possible defenses, consequences of the plea, and related

[7] Ryskamp's testimony is not set forth in the printed record (see R. 61), but it can be found in the State of Michigan's response to the application for certiorari, at pages 21-22.

rights of the accused. Concerning these matters, petitioner was asked no questions by the court, and said nothing to indicate that he had any comprehension of what his rights were, or that he had rights.

The most revealing portion of the above quotation from the trial court's opinion is the last sentence: "The charge of murder is serious indeed, but there is nothing complicated about killing a woman by gunshot." All homicide is not first degree murder. Yet the trial judge clearly equated the two. Finding nothing complicated "about killing a woman by gunshot," he inferentially concluded that there is nothing complicated about a charge of murder. With this fundamental misconception, he can hardly be presumed to have adequately advised petitioner.

Nor can the unrecorded questioning of petitioner in the judge's chambers give rise to an inference that the judge there explained petitioner's rights.[8] The judge cannot be presumed to have been then free of the misconceptions and peremptory attitude which he exhibited in the courtroom. Moreover, the judge himself did not describe this interview as involving anything more than a disclosure by petitioner

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[8] In a very recent civil case, *Jorgensen* v. *Howland*, 325 Mich. 440, it was claimed by appellee, and also by the trial judge (in a written opinion on motion for new trial), that an agreement inconsistent with the error assigned had been reached between counsel and the judge in chambers. The Michigan Supreme Court said (at 446-47):

"The agreement, if made, was in violation of Court Rule No. 11 (1945) [identical with Rule No. 11 (1935)] which provides:

"'No private agreement or consent between the parties to a cause, or their attorneys respecting the proceedings in a cause which shall be denied by either party, shall be binding, unless the same shall have been made in open court, or unless evidence thereof shall be in writing subscribed by the party or his attorney against whom the same is alleged.'

"In our opinion the above rule includes agreements made in the presence of or with the trial court. One of the purposes of the rule is to prevent exactly the type of controversy as is presented in the case at bar."

"of the details of this homicide" (R. 65). In the same vein, the judge later said (R. 88):

> "When you were arraigned this morning and pleaded guilty and your plea was accepted, in the talk that was had between the Court and you here in open Court, and in the talk that I had with you privately in chambers, it is my recollection that you said in substance the following, and I am going to repeat what I recall you said to me: * * *."

Following this, there are several pages of statements by the judge of information disclosed to him off the record by petitioner, relating solely to petitioner's past life, his relationship with the Parkers, and the circumstances of the shooting (R. 88-92). It is apparent from this material that during the unrecorded questioning of petitioner the judge directed himself to ascertaining petitioner's guilt, rather than to ascertaining whether or not petitioner's plea was understandingly made. Also, the entire proceedings on conviction and sentence lasted slightly more than an hour. Only a fraction of this time could have been spent in unrecorded conference with petitioner since during the same interval petitioner and four prosecution witnesses were examined on the record. When the quantity of the above-mentioned information elicited from petitioner during such unrecorded conference is considered, it becomes apparent from the time factor alone that little, if any, effective effort could then have been made by the judge to advise petitioner of his rights.

The Michigan Supreme Court was equally insensible to petitioner's constitutional rights in this regard. One of petitioner's Reasons and Grounds for Appeal was that (R. 10):

> "* * * the trial Court failed to advise Defendant of the consequences of his plea and did not advise defendant of the difference between first degree Murder, second degree Murder and Manslaughter * * *."

Petitioner further alleged in his accompanying affidavit that

> "• • • he had no counsel to inform him of the nature of the degree to which he was pleading to and that at no time prior to the entering of such plea, did he receive any explanation of the nature of the penalty provided by law, for such offense, and had no knowledge of the effects that his plea of guilty would have on his life and liberty." (R. 12.)

> "• • • he was not apprised of the degree or of the fact that if he pleaded guilty to the alleged charge of Murder in the First Degree that he would be sentenced for and during the period of his natural life • • •." (R. 13.)

Despite these allegations, the Michigan Supreme Court did not even specifically mention these claims in its opinion. Its only relevant remarks were the following:

> "Under this record it would be an insult to one's intelligence to sustain defendant's claim that he did not understand he was charged with murder." (R. 98.)

> "After a careful consideration of the various contentions made by defendant, we are brought to the conclusion that there is no merit to his motion for leave to make a delayed motion for a new trial." (R. 102.)

In their response to petitioner's application for certiorari, filed in this Court, the attorneys for the State of Michigan rely on two further recitals as evidencing that petitioner received adequate information or advice from the trial court before acceptance of his plea of guilty. These recitals appear in the justice's return from municipal court (R. 22), wherein petitioner waived preliminary examination, and in the mittimus (R. 16).

The recital in the justice's return is as follows (R. 23):

> "• • • that the charge made against said accused person as contained in said complaint and warrant, as

above set forth, was duly and distinctly read to me, the said Municipal Justice, to said accused person and that thereupon *his* rights in the premises were duly explained to *him* by me, the said Municipal Justice. The said accused person expressly *waived* examination as to the matters and things as charged in said complaint and warrant." (Emphasis supplied.)

This recital, with the exception of the three italicized words, is a mere printed form, requiring nothing more to be filled in by the subscriber than the proper pronouns to describe the accused, and the word "waived" or "demanded" as the case might be. Also, the statement that "thereupon his rights in the premises were duly explained to him by me" must be taken in its context to mean only that the justice explained to petitioner his rights in regard to a preliminary examination. Obviously, the trial judge's duty to explain the consequences of the plea, the nature of the charge, the possible defenses thereto, and petitioner's rights in *these* premises, at the time the plea of guilty is made, cannot be discharged by a justice of the peace in proceedings irrelevant to such plea.

The recital in the mittimus includes the following (R. 16):

"*Charles Quicksall*, the Respondent in this cause, having upon *his* voluntary plea of guilty to the information filed against *him* in this Court been duly convicted of the crime of *MURDER* and the Court, before pronouncing sentence upon such plea, being satisfied after such investigation as was deemed necessary for that purpose,—*and by private examination of the Respondent* respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of the nature of said accusation, and without any undue influence * * *." (Emphasis supplied.)

This recital, like the recital in the justice's return, is a mere printed form, the only exceptions being the brief por-

tions in italics. As a matter of fact, the printed form even includes an asterisk following the phrase, "after such investigation as was deemed necessary for that purpose," and a printed direction at the bottom of the form reads:

> "NOTE—Insert in space indicated by *, whenever deemed necessary, 'and by private examination of the Respondent.'"

On the face of it, this additional statement, that petitioner's plea was made "with full knowledge of the nature of said accusation," clearly fails to evidence such explanation by the trial judge of the consequences of the plea, nature of the charge, defenses thereto, and petitioner's related rights, as to render the lack of counsel non-prejudicial. In fact, this Court appears to have held just this in *DeMeerleer v. Michigan,* 329 U. S. 663, where substantially the same language was used by the trial court in passing sentence. (See Record in the Supreme Court of the United States, October Term, 1946, No. 140, page 2.) This Court there said (329 U. S. at 665):

> "At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea."

In any event, it cannot be inferred from any of the vague and conclusory recitals by the trial judge that he so advised petitioner as to render his plea of guilty one properly to be accepted from an uncounselled defendant in a first degree murder case. As has been seen, the record of the proceedings on the 1947 motion before the same judge demonstrates that he completely under-estimated his duties in regard to such defendants.

D. *Petitioner Was Subjected to a Trial as to the Degree of His Offense Without Advice or Assistance, and Suffered Prejudice Therefrom*

In *Gibbs* v. *Burke*, 337 U. S. 773, the Court held that due process was denied to an uncounselled defendant when, upon trial after plea of not guilty, serious errors were committed which counsel would have prevented.

In the instant case, petitioner was subjected to a trial as to the degree of his offense, in which similar errors were committed. Thus, he not only pleaded guilty without advice, but also underwent a trial without the assistance of counsel, thereby suffering the prejudice both of an uncounselled accused who pleads guilty, and of one who pleads not guilty.

The pertinent statute provides (Michigan Penal Code, § 318 [Mich. Stats. Ann. § 28.550]):

> "The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first [1st] or second [2nd] degree; but, *if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly.*" (Emphasis supplied.)

The italicized portion of this statute was construed by the Michigan Supreme Court in *People* v. *Martin*, 316 Mich. 669, wherein the defendant had pleaded guilty to a charge of murder under an information which, like the present one, did not specify the degree of the crime, the manner or means of perpetration, nor the attending circumstances. Twenty-two years after conviction and sentence for first degree murder, the defendant moved for a new trial. In granting a new trial, the court said:

> "The record of proceedings had on arraignment and at time of sentence is silent on the subject, but plain-

tiff [the state] now has filed the affidavits of the then sheriff and of a police officer who was present at the arraignment, who depose and say that before sentence they discussed the facts of the case with the judge and that he then interviewed the defendant. It is plaintiff's position that from these discussions the court learned that this was a killing committed in the perpetration of a robbery, and that from a full knowledge of the facts of the case, thus acquired, the court was enabled to determine the degree of the crime in conformity with the statute." (316 Mich. at 671.)

"*It is the clear intent and meaning of the statute that the court shall proceed to a determination of the degree of the crime on the basis of testimony given by witnesses sworn and examined in open court. Not having done so, the court could not, as the statute provides, 'render judgment accordingly,' and it was, therefore, without jurisdiction to impose sentence. It follows that the sentence is invalid and void.*" (316 Mich. at 672; emphasis supplied.)

To the same effect, see *People* v. *Machus*, 321 Mich. 353.

As a consequence of the lack of counsel, petitioner's ignorance, and the trial court's failure to apprise him of his rights and to safeguard the same, petitioner suffered the following specific elements of prejudice in the hearing to determine the degree of his offense: (1) He was deprived of his right, under the Michigan Constitution, not to be a witness against himself. (2) The prosecutor was allowed prejudicial leeway in the examination of witnesses, and incompetent evidence was admitted. (3) There was no cross-examination of the prosecution's witnesses, nor was any evidence introduced in petitioner's behalf.

(1) Article II, Section 16 of the Michigan Constitution provides:

"No person shall be compelled in any criminal case to be a witness against himself . . ."

It must be noted that the question here is not, as in *Adamson* v. *California*, 332 U. S. 46, whether what was done at a trial in which an accused was represented by counsel conformed to the requirements of the Federal Constitution. The question instead is whether what was done to an uncounselled accused, accorded him the rights which were his under Michigan law, and which counsel certainly would have obtained for him.

It need not be determined whether, under Michigan law, petitioner, uncounselled as he was, might have been deemed to have waived his state constitutional right by having failed to claim it. In this connection, it was revealingly stated in *People* v. *Smith*, 257 Mich. 319 (syllabus):

> "• • • said rule [i.e., the rule that the privilege against self-incrimination is waived by failure to claim it] is not applicable where witness is in custody accused of crime at time testimony is taken, where he is brought before jury for sole purpose of securing evidence on which to indict him, or where he is too ignorant to protect himself."

The record in the present case convincingly demonstrates that through lack of advice from counsel or court, petitioner was deprived of his state constitutional right. The main, if not only, basis for the trial court's determination that the offense committed was murder in the first degree is found in the judge's examination of petitioner.

That examination began in the following abrupt fashion (R. 88):

> "The Court: All right, Quicksall, you may stand up here."

The trial judge then proceeded to state his version of petitioner's unrecorded responses to prior questioning, eliciting a rarely broken chain of "yes, sirs" (R. 88-92).

Among the damaging portions of this one-sided exchange were the following (R. 89):

"Q. You further stated that after your release from prison in Ohio for non-support you returned to Kalamazoo and resumed your abode at the home of the Parkers?

"A. Yes, sir.

* * * * * * *

"Q. That thereafter, if not before, you and Mrs. Parker became intimate?

"A. Yes, sir.

"Q. Probably before, wasn't it?

"A. Yes, sir.

"Q. You also stated that in 1934 you and Mrs. Parker made an agreement that if you and she ever got caught in your unlawful intimate relationship that you would die together.

"A. Yes, sir."

And continuing (R. 91):

"Q. And you then said that she told you that her husband was talking about leaving her and getting a divorce?

"A. Yes, sir.

"Q. And that she then asked you to keep your agreement with her that you and she should die together?

"A. Yes, sir.

"Q. You say that she then produced this revolver?

"A. Yes, sir.

"Q. And that at her request you picked it up and shot her?

"A. Yes, sir.[9]

* * * * * * *

"Q. And that you then shot yourself?

"A. Yes, sir."[9]

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[9] In the 1947 proceedings, petitioner denied that he shot either Mrs. Parker or himself (R. 48, 59).

The damaging influence of this "testimony" on the trial judge's determination that the murder was in the first degree appears clearly from the judge's recital of such determination at the conclusion of the examination of petitioner. The judge said (R. 92):

> "* * * it appearing from the testimony of such witnesses *and from the statement of the respondent* that the killing was deliberate and premeditated, *and under the testimony of the respondent himself that it was in pursuance of a suicide pact,* so-called, the Court finds and determines that respondent is guilty of murder in the first degree * * *." (Emphasis supplied.)

It is highly doubtful that the necessary finding of "deliberation and premeditation" would or could have been made on the basis only of the testimony of the four prosecution witnesses (Cobb, Pierce, Ketter, and Conner; R. 64-80).

The reliance of the trial judge, in such determination, on the "suicide pact" testimony of petitioner is further illustrated by the statement in the second paragraph of his 1947 opinion denying petitioner's motion for new trial (R. 29):

> "On July 3rd Defendant was in Bronson Hospital recovering from a gunshot wound, self inflicted at the same time that he shot and killed Grace Parker in pursuance of a suicide pact, after both had consumed a considerable quantity of beer * * *."

The Michigan Supreme Court gave no specific attention to petitioner's allegation in his affidavit accompanying his Reasons and Grounds for Appeal that (R. 13)

> "* * * he was not apprised by the trial Court of the fact that he had Constitutional Rights, and that he doesn't have to answer any questions that would involve him in the alleged crime of which he was being tried."

It did, however, comment significantly at the beginning of its opinion (R. 95):

> "The death of Mrs. Parker was evidently the culmination of a suicide pact entered into by defendant and the deceased in which it was agreed that in event of detection of their unduly intimate relations they 'would die together.' "

The phrase "would die together" is a quote from the examination of petitioner by the trial court in the statutory hearing as to degree (R. 89).

As in *Gibbs* v. *Burke*, 337 U. S. 773, the violation of petitioner's right not to be a witness against himself would not have been suffered had counsel been available to him. Moreover, if an examination of witnesses off the record does not discharge the duty imposed upon the trial judge by the Michigan statute, as was held in *People* v. *Martin*, 316 Mich. 669 (*supra*, this section), it would seem that the duty is similarly not discharged by what amounts to a dictation by the judge into the record of his version of an out-of-court discussion on which he relies. Not only did the present trial judge thus circumvent the statute as construed, but also, by the manner of his examination of petitioner, he assumed the non-judicial role of prosecutor. If petitioner had had counsel, none of this would have happened.

In three other decisions handed down at the same time as the *Gibbs* decision, this Court, speaking each time through Mr. Justice Frankfurter, similarly condemned state convictions based largely on statements by uncounselled defendants who had not been advised of their state rights to remain silent.

Thus, in *Watts* v. *Indiana*, 338 U. S. 49, it was said (at 54):

> "Ours is the accusatorial as opposed to the inquisitorial system. • • • Under our system society carries the burden of proving its charge against the accused

> not out of his own mouth. It must establish its case, not by interrogation of the accused *even under judicial safeguards,* but by evidence independently secured through skillful investigation." (Emphasis supplied.)

As one of the "characteristics of the accusatorial system," Mr. Justice Frankfurter included "the duty to advise an accused of his constitutional rights." (338 U. S. at 54) And in *Harris* v. *South Carolina,* 338 U. S. 68, it was noted (at 70):

> "Petitioner was not informed of his rights under South Carolina law, such as the right to secure a lawyer, the right to request a preliminary hearing, or the right to remain silent."

To the same effect, see *Turner* v. *Pennsylvania,* 338 U. S. 62, 64.

(2) The record reveals an uninhibited and prejudicial freedom accorded the prosecutor in his examination of the four witnesses he chose to call from among the 18 listed on the information (R. 18).

Thus, despite the dangers inherent in the use of leading questions on direct examination, a glance at the record of the examination of prosecution witnesses (R. 64-80) discloses the extreme latitude allowed the prosecutor in this respect. Nor did the trial court at any point attempt to control this practice.

The prosecutor was also allowed to introduce damaging hearsay testimony, either incompetent or of borderline competence. Cf. *Gibbs* v. *Burke, supra.* Where the admissibility was doubtful at best, the prosecutor was permitted to introduce such testimony first and to attempt to qualify it afterwards. Again, the trial judge at no point cautioned the prosecutor nor independently questioned the witnesses to satisfy himself as to admissibility.

Examples of such hearsay include the following:

In the examination of Mrs. Jessie Pierce:

"Q. Later on there was something called to your attention, was there not, about some trouble that had happened over at the Parker cottage?

"A. Well, before that I had had breakfast with Mrs. Parker * * * and she asked me to take her little daughter to my home because she wanted to have a showdown with this party [petitioner]; then claimed that she was going to forbid him to come around there." (R. 67-68)

"Q. Then what occurred?

"A. Well, the daughter came screaming out and told me that Charley had shot her mother." (R. 69)

In the examination of Mrs. Cora Ketter:

"Q. On the morning of July 2nd last do you recall an occasion when Mrs. Pierce came to your house?

"A. Yes.

"Q. And told you that there was some trouble at the Parker cottage?

"A. Yes.

"Q. And wanted you to call the sheriff, did she?

"A. Yes." (R. 73-74)

In the examination of Charles Conner:

"* * * Doctor Gelding was there and handed me a gun wrapped in a handkerchief, saying that he had picked it off the bed." (R. 77)

During the examination of Mrs. Pierce and Mrs. Ketter, the prosecutor elicited hearsay testimony as to what Mrs. Parker had said in the presence of the two witnesses after the shooting (R. 71-72, 75). This testimony was to the following effect: after Mrs. Pierce had asked Mrs. Parker several times who had shot her, Mrs. Parker answered, "Charley did." Subsequent to the introduction of such

testimony, under prompting by the prosecutor, Mrs. Pierce testified that "I didn't know she was quite so bad, and she said 'No, Jessie, I am going because it is all muddy water before my eyes' " (R. 71-72); similarly, Mrs. Ketter said that "we really didn't realize how bad she was, and she made the remark that she was going to die" (R. 75). Neither of the two witnesses testified that Mrs. Parker's alleged statements about it being "all muddy water" or about dying were made before or even immediately following her assertion that "Charley" had one it. Instead, the testimony of both witnesses reveals that Mrs. Parker's expressions as to her dying were made some time after her statement as to who had shot her (R. 71-72, 75). The time interval seems from the testimony of Mrs. Pierce to have been substantial, it appearing that she left the cottage, looked for Mrs. Parker's husband, and returned to another room before Mrs. Parker made her "muddy water" statement (R. 71-72).

In Michigan, "it is elementary that before a statement made by the deceased shall be received as his dying declaration, a preliminary investigation shall be made by the court to determine its admissibility as such. Through this investigation the court must be satisfied that the declarant was in fact *in extremis* at the time the declaration was made, and that he made it under a sense of impending death". *People* v. *Christmas*, 181 Mich. 634, 646. Such investigation and such showing were not made in the case at bar.

In addition, at the conclusion of the prosecution's case, the prosecutor advised the trial judge that "there have been statements taken and the sheriff is out of the city, and he had a talk with this respondent, which carries out the same line as told to the court here" (R. 79-80). This "testimony" was thus effectively injected as corroborative of testimony actually given.

Another factor of prejudice to petitioner was the introduction, during the questioning of Conner, of a supposed suicide note without proper authentication (R. 77-78):

"Q. Did you find a note there?
"A. Yes.

"(Paper marked Exhibit C).

"Q. I show you People's Exhibit C; where was that note found?
"A. That was found on the dresser in the bedroom.
"Q. How close to this respondent?
"A. Well, it was just about room between the dresser and the bed. That was taken up, practically all of it, by the width of Quicksall's body, a distance of possibly 30 inches.

"Mr. Tedrow: We wish to offer this in evidence, your Honor.
"The Court: Do you know anything about the handwriting?
"Mr. Tedrow: It is signed.
"The Court: You may read it into the record.
"Mr. Tedrow (Reads): 'July 2, 1937. I am dying, Grace and I together, because we cannot live apart. Charles Quicksall.'"

There was no other testimony regarding this note, except for the statements of Mrs. Pierce that she had not seen any such note in the Parker cottage (R. 69, 73).[10]

(3) There was no cross-examination of the prosecution's witnesses nor introduction of evidence in petitioner's behalf; nor was petitioner advised of his rights so to cross-examine and introduce evidence.

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[10] In his "Traverse or answer to Attorney General's Response on behalf of the people of the State of Michigan," drawn *pro se* and filed in this Court, petitioner "denies • • • that there was ever a so-called suicide note."

In this respect, the present case is identical with *DeMeerleer* v. *Michigan*, 329 U. S. 663, where one of the grounds for reversal was that (at 664-65)

> "No evidence in petitioner's behalf was introduced at the trial [*i. e.*, the trial to determine the degree of murder after plea of guilty] and none of the State's witnesses were subjected to cross-examination."

It should be noted, moreover, that the state's case against DeMeerleer was premised on the testimony of three *eye witnesses* (see *People* v. *DeMeerleer*, 313 Mich. 548, 550), a factor significantly divergent from the present case, and one rendering the absence of cross-examination and of evidence in DeMeerleer's behalf less prejudicial.

A hearing can hardly be said to be "fair" where the elicitation of testimony is entirely one-sided and that one side not even subjected to cross-examination. This is true with greater emphasis where the one-sided testimony is introduced by the state in a criminal prosecution and is largely of a hearsay and circumstantial nature.

Nor did the trial judge exercise petitioner's rights for him. The record shows not one instance where the judge did other than to aid the prosecution. In his interrogation of petitioner, he made no effort to elicit evidence of extenuating circumstances such as might be termed "testimony in petitioner's behalf"; on the contrary, the petitioner was examined by the judge in such a way as to lead him into being a witness against himself.

It is not relevant, on this appeal, to consider the merits of petitioner's claim that he was not guilty (R. 9, 13, 14, 33, 35, 36, 37, 38, 48). It is, however, proper to consider some of the things bearing upon the question and degree of guilt concerning which the record is silent and into

which inquiry would have been made if petitioner had been represented by counsel. Let us note a few examples:

Of the 18 witnesses endorsed on the information (R. 18), only four were called to testify.

Though petitioner and Mrs. Parker had been drinking at the time of the shootings (R. 29, 90), there was no testimony as to whether either of them was or was not intoxicated, nor as to just how much either had drunk. The coroner, in reporting the results of his autopsy on Mrs. Parker (R. 64-66), made no reference to whether alcohol was found in the body or in what quantities. The hospital record, which must have shown petitioner's condition when admitted, was not produced. As has been previously noted, intoxication is a recognized defense in Michigan in a trial for first degree murder. *People* v. *Jones,* 228 Mich. 426.

The gun which apparently did the shooting was handed, wrapped in a handkerchief, to Deputy Sheriff Conner by one Dr. Gelding shortly after the shootings (R. 77). Yet no evidence was offered as to whether the gun was fingerprinted, or as to whose fingerprints were on it. (The gun was identified and marked as an exhibit (R. 71), but was not offered in evidence.)

The coroner (R. 64-66) did not testify as to the presence or absence of powder burns upon the body of Mrs. Parker. Nor was there any other testimony as to tests to determine whether or not Mrs. Parker or petitioner had fired the gun.

What facts might have been developed by these and similar inquiries is conjectural. But can it be doubted that the facts would have been elicited had petitioner been represented? And can it be assumed that the facts, if known, would not have tended to establish a defense against first degree murder?

There was manifest prejudice to petitioner in being without counsel during this critical hearing to determine the

degree of his offense, involving as it did the pitfalls of a trial as on a plea of not guilty. Cf. *Gibbs* v. *Burke, supra*. Moreover, the central issue of the proceeding was a highly technical one—whether first or second degree murder had been committed—in contrast to the situation in *Betts* v. *Brady*, 316 U. S. 455, 472, where the "defense was an alibi," and the "simple issue was the veracity of the testimony for the State and that for the defendant."

E. *The Courts Below Failed to Give Proper Consideration to Petitioner's Contentions That He Had Been Held Incommunicado, and That His Plea of Guilty Was the Result of Misrepresentation and Fear*

(1) The "right to the aid of counsel when desired and provided by the party" has always been included in the concept of due process in this country. *Powell* v. *Alabama*, 287 U. S. 45, 68-70. "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53.

Petitioner asserted below that he had been held incommunicado in the hospital, and was denied opportunity to secure counsel (R. 10, 11, 34, 36, 51, 63). Thus, the following occurred at the hearing before the trial court (R. 51):

"Q. Did you at any time in this Court suggest to the Court that you wanted an opportunity to talk to a lawyer?

"A. I don't believe I ever did, your Honor. An attorney was never mentioned to me. I was never asked if I needed one. Even when I was in the hospital, I asked them. I asked them if I could have somebody call up for me. He says he wasn't allowed to let anyone in to visit me, talk to me or use the telephone.

"Q. At the hospital?

"A. At the hospital.

"Q. Who was that?

"A. The deputy sheriff.

"Q. Who was it?

"A. I don't know his name. This gentleman here was on in the evening, but I don't recall who the man was in the day time.

"Q. Mr. Ryskamp was on in the evening?

"A. Yes, sir.

"Q. How many hours,—eight hours?

"A. I couldn't say. I was asleep most of the time. They give me shots to put me to sleep. I couldn't call anybody.

"Q. Well, you weren't asleep when you were in this Court?

"A. I was sick, your Honor. I was probably not asleep, but very sick."

Again, at the conclusion of the hearing, the following occurred (R. 63):

"The Court: • • • You were not denied the right of counsel; nothing in the history and the record in this case to show that you were denied an opportunity——

"Defendant: (Interrupting) Your Honor, I couldn't get in touch. I couldn't get out of bed and use a telephone. I asked to have somebody call, but—I don't know who gave the order, but the man that was on guard told me it was the Prosecutor and Sheriff.

"The Court: How long had you been out of the hospital when you were brought into this Court?

"Defendant: I left the hospital on the 15th: the following day."

It is apparent from the trial judge's opinion on the 1947 motion that he relied upon certain testimony of Sheriff Struble in determining that petitioner had not been denied an opportunity to obtain counsel (R. 32). Regarding this testimony, the printed record shows only that Struble testified, but does not reveal what he said (R. 61). The testi-

mony is, however, set forth in the response to the application for certiorari, filed in this Court by the State of Michigan (Response, pp. 18-21). As disclosed therein, Struble testified that he had no knowledge of anyone informing petitioner that he could not have visitors or use a telephone to obtain financial assistance and a lawyer.

Struble was the only witness, other than petitioner, who testified in regard to the matter. The claim of petitioner was not contradicted by the sheriff's testimony. As appears from the excerpts from the record quoted at the beginning of this section, petitioner's claim at the hearing was, both before and after Struble had testified, that his day guard at the hospital had stated that petitioner could not "have somebody call up for me. He says he wasn't allowed to let anyone in to visit me, talk to me or use the telephone" (R. 51).

In the light of the above, it becomes highly significant that the trial judge did not even question either Struble or Ryskamp as to the identity or present availability of the day guard at the hospital, though certainly either one could have supplied information on the points. Nor did the judge question Ryskamp, the night guard at the hospital, as to any of the facts bearing directly on petitioner's claim.

It would seem, therefore, that the trial judge's perfunctory examination of Sheriff Struble, and the answers thus elicited, constitute an altogether inadequate basis for a finding that petitioner was not denied a fair opportunity to obtain legal assistance. Moreover, the very form of the questions asked Struble by the judge reveal the inadequate character of even this narrow investigation of petitioner's claim.

When petitioner's helpless condition from the time of the alleged crime, July 2, 1937, until the day he was taken from the hospital, July 15, 1937, is considered, his claim of denial of an opportunity to secure counsel becomes a

most credible one. He was without funds (R. 39, 62). In this regard, the following colloquy between him and the trial judge at the 1947 hearing is revealing (R. 62):

> "Q. What relatives did you want to get in touch with here that you claim you weren't permitted to?
> "A. I had a sister and sister-in-law down in Ohio.
> "Q. Here.
> "A. No, in Ohio, and I wanted to call them up. You see at that time, your Honor, I didn't have no money at all to hire counsel, and if I could have got in touch with them I know I could have got some."

In addition, as has been shown in previous sections of this brief, petitioner was an extremely sick man throughout this two-week period. The record fairly imports that he had no visitors, nor any contact with persons other than attendants and officers of the law. His only means of obtaining help was thus through use of a telephone. Petitioner was bed-ridden and under sedatives while in the hospital. As he stated to the trial judge, he wasn't able to get out of bed to call (R. 51, 63), even if he would have been permitted so to do by his guards.

It is submitted that in the present state of the record the substance of petitioner's contention that he was effectively denied a fair opportunity to secure counsel stands unchallenged; that the finding of the trial judge to the contrary is without support; that the peremptory and inadequate investigation into the facts by the trial judge, apparently undertaken with predetermined conclusions, did not rise to the dignity of a "hearing" on petitioner's claim of federal right; and that this matter should therefore be remanded to the state courts for proper consideration.

(2) A conviction based on a plea of guilty which is induced by misrepresentations of law-enforcement officers as to the consequences of the plea is a violation of due process.

Smith v. *O'Grady*, 312 U. S. 329, 334; see *Hawk* v. *Olson*, 326 U. S. 271, 276.

In the papers filed in the trial court in support of his 1947 motion, petitioner alleged that his plea of guilty had been "caused by fear and by erroneous belief based upon a false promise, made to him by the Sheriff and the Prosecutor" (R. 37); that he was informed by the prosecutor "that he the Prosecutor and the deputy in charge of the Hospital had a hard time from keeping the husband of the woman who he had shot from coming in the Hospital and throwing acid in the Deponent's face" (R. 36); and that "he was taken before the Judge of the Circuit Court and the Prosecutor said, 'Your Honor, Charley wants to plead guilty and get this over with' " (R. 37).

Again, at the hearing on his motion, petitioner said in response to the trial judge's solicitation of a further statement (R. 48):

> "Well, in the first place, I wasn't guilty of the crime that I was charged with, of first degree murder. I was under the impression when I pleaded guilty that I was to plead guilty to manslaughter. That was what was promised me in the hospital at the time I was there, and if I had knew I was going to be charged with the crime of first degree murder, I sure never would have pleaded guilty."

A few moments later, petitioner added (R. 48-49):

> "Then he tell me—the Prosecutor and he both tells me that they had such an awful hard time of keeping Mr. Parker from coming in and throwing acid on me, and naturally they put more fear into me than what it was, lying there with a bullet in me, pretty sick, so when they said if I would consent to plead guilty to manslaughter that they would see that I wouldn't get more than two years—or less than two years or more than fifteen, I figured that would be the best way out

> and consented. When I got into Court Mr. Tedrow [the prosecutor]—he pleaded guilty for me. I never opened my mouth, but I still under the impression that I was getting charged with manslaughter until the Court read off the sentence."

It appears from the trial judge's line of interrogation immediately following these assertions (R. 49-51; quoted *supra*, Section II, C) that he considered it a sufficient answer to petitioner's claim of misrepresentation that petitioner knew he was charged with "murder." But a claim of misrepresentation as to sentence on a plea of guilty, by public officers having the powers of a prosecutor and sheriff, is not inconsistent with knowledge that the charge against one is murder. Even a lawyer would find no inconsistency between the two, in view of the fact that manslaughter is an included offense on a charge of murder.

Nor, in any event, can knowledge that the charge is murder obviate the effect of fear on the voluntariness of the plea. Despite this, the record below discloses no inquiry whatsoever by the trial judge into the alleged report of the husband's acid-throwing threat; this allegation evoked no interest. It is significant, moreover, that even under the clumsy and inadequate cross-examination by petitioner at the hearing, Sheriff Struble admitted that he had knowledge of the acid-throwing report (Response, p. 20).

In further demonstration of the erroneous approach of the trial judge to the claim of misunderstanding through misrepresentation, the following should be noted. At the hearing on the motion in 1947, Harry Ryskamp, one of petitioner's guards during his stay at the hospital, was sworn and testified. This testimony, omitted from the printed record before the Michigan Supreme Court and this Court (see R. 61), is set forth in the response to the application for certiorari (Response, pp. 21-22).

The substance of Ryskamp's testimony is found in the trial judge's opinion denying the motion. It is stated therein:

> "During the several days of Defendant's confinement in the hospital, Sheriff Struble provided guards in his room on eight hour shifts. One of those guards was Harry Ryskamp, now a Deputy Sheriff and Court Officer. On July 3rd [the day after the double shooting] Defendant said to Mr. Ryskamp: 'How long will I have to lay here? I wish * * * it had taken effect on me like it did on her. If I get over this, it will mean life for me anyway.' * * * Mr. Ryskamp immediately made notes of his talk with Defendant, signed them and placed them in the Sheriff's file, where they have been all these years and are now" (R. 29).
>
> "Harry Ryskamp, a guard at the hospital, testified upon the hearing of the motion, *as already stated herein,* that Defendant well realized that he was guilty of murder and that he would be sentenced for life." (R. 32; emphasis supplied.)

Thus, the trial judge apparently fancied that this testimony of Ryskamp as to petitioner's hospital statement precluded any claim by petitioner that his plea had been entered as a result of misrepresentation as to the sentence he would incur. What little weight such reasoning would have in any event, considering petitioner's naturally despondent condition the day after the shooting and the incurring of his serious wound, is completely lost when it is realized that the claimed misrepresentation by the prosecutor and sheriff took place *after* the statement to Ryskamp. (See R. 36-37, the fair import of which is that the misrepresentation occurred on July 14, 1937.)

In dealing in his opinion with Sheriff Struble's testimony, the trial judge said only this (R. 32):

> "He [petitioner] claims in his motion that the sheriff and Prosecuting Attorney denied him an opportunity

to get an attorney before he was arraigned in this Court July 16, 1937.

"Charles Struble, the Sheriff in 1937, as a witness upon the hearing of this motion, denied *that* claim in its entirety." (Emphasis supplied.)

The trial judge, thus, apparently did not rely on Struble's testimony regarding the alleged misrepresentations in deciding against petitioner on this claim. The judge apparently thought that, since petitioner knew he was charged with murder and had indicated a fear on the day following his serious wounding that he would get "life," it was not important whether or not the misrepresentations were in fact made. The latter view would explain the judge's failure to examine the sheriff more carefully as to what representations, if any, were made to petitioner. The examination of Sheriff Struble by the judge, insofar as pertinent, is as follows (Response, pp. 19-20):

"Q. He says in his affidavit that he was advised by the Sheriff and Prosecuting Attorney that he better plead guilty to the charge of manslaughter, and that he, the Prosecuting Attorney, would see that he automatically would receive a sentence of two to fifteen years. Did you ever hear of anything like that?

"A. I never did.

* * * * * * *

"Q. He says under oath that he was not informed by the Sheriff or Prosecuting Attorney that if he entered a plea of guilty he would be sentenced to life imprisonment. Of course you didn't know what he would be sentenced?

"A. I didn't know."

It is submitted that the above examination, even if the trial judge had relied on it, can hardly be said to constitute such refutation of petitioner's federal claim as to warrant the summary disposition it received. First, the only other

apparent witness to the alleged transaction, besides the sheriff and petitioner, if indeed the sheriff was such a witness, was the former prosecutor, Tedrow, and he was unavailable because of illness (R. 49). Second, the sheriff had an obvious interest in denying partnership in a miscarriage of justice. Third, there was no attempt to ascertain from Sheriff Struble the character of the discussions that he admittedly (see Response, p. 18) engaged in with petitioner prior to the plea of guilty. And certainly the prosecutor had engaged in similar discussions with petitioner, since as petitioner alleged, without refutation, "he was taken before the Judge of the Circuit Court and the Prosecutor said, 'Your Honor, Charley wants to plead guilty and get this over with' " (R. 37, 49).

Representations of a most material and misleading sort could well have been made, either by the sheriff or in his presence, without the sheriff feeling impelled to answer otherwise than he did the one really relevant question asked by the judge. That question was not only duplicitous, but, indeed, was so framed as to strongly suggest, if not require, a negative response (*see supra*). It hardly appears that the judge was impartially seeking the truth in asking only that question.

It is true that petitioner was permitted to question Sheriff Struble, following the questioning by the trial judge. But it is also clear therefrom that such questioning can hardly be characterized as "cross-examination," so inept and untesting was it (see Response, pp. 20-21). The inadequacy must have been apparent to the trial judge.

The Michigan Supreme Court, in dealing with the same claim of misrepresentation on appeal, apparently fell into the same basic errors as the trial court. Thus, its opinion reveals that it too believed that if petitioner knew he was charged with murder, and expressed fear of a life sentence

on the day following the shooting, his claim of misrepresentation could not be sustained (R. 97-98).

The Michigan Supreme Court later stated (R. 99):

> "In any event since defendant did not at the time report these matters to the trial judge he should not be heard at this late date to assert them to the same judge in the hope of invalidating the sentence imposed."

This novel concept of the law seems inconsistent with the expressions of this Court in right-to-counsel cases. Nor does any such estoppel properly arise from the facts. There are several plausible explanations of petitioner's silence during the 1937 proceedings. He was very sick at that time; his whole attitude was one of submissiveness and enervation; he was an uneducated and uninformed layman who could not be expected to understand that if he had spoken, his plea of guilty should not have been accepted by the court. Perhaps he thought that the prosecutor and the sheriff, in proposing the plea of guilty, were acting as spokesmen for the judge, and that their promises would somehow be kept. As he asserted in his affidavits to the Michigan courts (R. 13; 36-37):

> "* * * he was not familiar with such procedure in Court and thought that the Prosecuting Attorney and the Sheriff was trying to help him and was telling him the truth * * *."

To deprive an uncounselled accused of his most fundamental rights unless he asserts them with the timeliness of a lawyer is, in effect, conclusively to presume waiver of such rights. This Court has rejected the view that waiver of fundamental constitutional rights can be presumed, much less be conclusively presumed. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464, and *Glasser* v. *United States*, 315 U. S. 60, 70.

Petitioner was entitled to have his claim that his plea was misunderstandingly and involuntarily rendered fully

and properly considered, including adequate inquiry into and findings upon the crucial question of what representations were in fact made. It is submitted that no such consideration has yet been afforded him.

III. *Petitioner Did Not Waive His Right to Counsel*

The opinion of the Michigan Supreme Court contains language vaguely intimating that its decision was based in part on a finding that petitioner waived his right to counsel. Thus, after stating that petitioner was not "inexperienced in court proceedings" nor "one who by reason of youth or adverse circumstances should have his rights carefully protected by the appointment of counsel, which, as above noted, was not requested," the court said (R. 97):

> "He had been twice married and twice divorced. In addition to the above court experience he had been twice convicted of a felony and served penitentiary terms—16 months in Ohio [on a charge of non-support (R. 89), a fact omitted by the court] and a latter term in Michigan for breaking and entering. At the present hearing defendant at no time asserted that when he pleaded guilty he was not aware of his right to be represented by counsel, and, if circumstances justified, appointment of such counsel for him by the court. In view of defendant's intelligence, his age, and his earlier experiences in court, there would seem to be no room for doubting that defendant at the time he pleaded guilty knew of his right to counsel if requested. Even at the hearing of the present matter he made no such request, but instead he chose to proceed without the appointment of counsel. Under the circumstances disclosed the rights of defendant were not infringed by reason of counsel not having been appointed for him at the time he pleaded guilty."

The conclusive answer to any suggestion of waiver contained in the above is found in the decisions of this Court on the matter. Thus, a waiver of counsel must be intelli-

gently and understandingly made. *Von Moltke* v. *Gillies*, 332 U. S. 708, 727; *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441. This necessarily requires knowledge of the *value* of counsel in the particular case, as well as knowledge of the right to an appointment of counsel. And every reasonable presumption against waiver of this fundamental constitutional right is to be drawn in favor of the petitioner. *Johnson* v. *Zerbst*, *supra*, at 464; *Glasser* v. *United States*, 315 U. S. 60, 70; *Von Moltke* v. *Gillies*; *supra*, at 723. These established principles were completely overlooked by the Michigan Supreme Court.

As was stated in the *Von Moltke* case, where there was both a purported oral and written waiver (332 U. S. at 723-24):

> "We have said: 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. *To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.* A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from

a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

"This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." (Emphasis supplied.)

There can be no doubt, in the absence of any finding by the trial court and in the other circumstances revealed by the record, that petitioner did not intelligently and understandingly waive a "known right." See *Johnson* v. *Zerbst*, 304 U. S. 458, 464. The case is completely different in this regard from *Carter* v. *Illinois*, 329 U. S. 173, 177, where the accused's plea of guilty was accepted only after he was expressly offered counsel by the trial court, and was expressly advised of the consequences of his plea, of the degree of proof necessary to convict him, and "of all his rights in the premises."

Moreover, the statements made by the Michigan Supreme Court in reaching its conclusion that the rights of petitioner "were not infringed by reason of counsel not having been appointed for him" are not such as could support even a finding that petitioner knew of his right in the 1937 proceedings to an appointment of counsel upon request.

The first statement is that petitioner was not without past experience in court—two divorce actions, a non-support charge, and a breaking and entering charge (R. 88-89). Surely, the circumstance that in Ohio a man has been twice divorced (in which suits he may never actually have appeared in court) and also has been convicted of non-support cannot demonstrate that he knows that he has the right, on a murder charge in Michigan, to be represented by counsel appointed by the court. As to the breaking and entering

conviction in 1932, there is no hint in the record as to the nature of the proceedings experienced by petitioner (R. 89). This conviction, obtained as it was in the same court that convicted petitioner of murder in 1937, was perhaps as abruptly accomplished as the conviction in the instant case. In that event, petitioner would have learned little of his rights.

The court also said that in the 1947 proceedings petitioner did not assert "that when he pleaded guilty he was not aware of his right to be represented by counsel, and if circumstances justified, appointment of such counsel for him by the court." Petitioner, however, did assert that he was denied the right to assistance of counsel (R. 11, 12, 33, 36, 51) and that he lacked the funds to retain counsel and was denied opportunity to reach Ohio relatives who might have provided such funds (R. 62, 63). Surely, a layman-prisoner proceeding without the assistance of counsel cannot be held to greater precision than this in framing an issue.

In addition, in 1937 the Michigan law did not entitle a defendant as of right to appointment of counsel at state expense, even in a murder case. As was said in *People* v. *Williams*, 225 Mich. 133, 138, quoted with approval in *People* v. *DeMeerleer*, 313 Mich. 548, 553-54, such right

> "* * * as a rule, to which, of course, there may be exceptions, cannot be invoked by an accused until after plea and not at all under a plea of guilty."

Thus, even if petitioner had been aware of the state law (an assumption unwarranted on this record), he could not have assumed, unless informed by the trial judge, that in his impecunious state he could have had the aid of counsel.

The court stated further that petitioner in 1947 "chose to proceed without the appointment of counsel." It is true

that petitioner was asked by the trial judge at the 1947 hearing, "Have you a lawyer?" "Do you expect to have a lawyer?" "You have no desire to have a lawyer attend you at this time, then?" (R. 46-47) But it is submitted that these questions, at least as understood by petitioner, constituted something less than an offer of a court-appointed counsel, free of charge. The trial court's statement "You have no desire to have a lawyer attend you at this time, then?" was reasonably subject in petitioner's mind to the interpretation that it was an offer of an opportunity for petitioner to *hire* a lawyer himself. Such interpretation fits the context, since one of petitioner's grounds for asserting a denial of due process in the 1937 proceedings was that he had not been afforded an opportunity to retain counsel. That petitioner would wish to proceed in proper person, instead of retaining a lawyer, is clearly understandable, in the light of the allegations in his affidavit to the trial court that his delay in pressing his claim of denial of due process was largely attributable to his lack of funds (R. 39). There is no reason to suppose that he would have "chosen" so to proceed had he understood that counsel would be provided at the expense of the state. On the contrary, petitioner's great appreciation for the assistance of counsel which this Court has provided indicates that he would never have refused the aid of counsel if aware that it was gratuitously offered.

Moreover, petitioner's statements in 1947 in relation to the 1947 proceeding do not establish his position in 1937, under completely different circumstances.

There is nothing in the record to indicate that in 1937, petitioner ever was apprised of his right to counsel, or otherwise knew of such right or its value. The record is thus barren of support for a finding of waiver, which finding, as has been indicated, the trial judge did not make.

IV. *The Misconceptions of the Courts Below as to the Requirements of Due Process in Proceedings Involving Uncounselled Defendants Compel the Closest Scrutiny of Their Findings.*

A careful reading of the opinion of the Michigan Supreme Court in the present case, and a measuring of it against the record, disclose serious misconception of the requirements of due process as applied to uncounselled defendants. Important in this respect is the error revealed in the following passage from that opinion (R. 101):

> "Our conclusion is that the instant case is in the field of law and governed by our decisions in such cases as People *v.* Fries, 294 Mich. 382, and in re Elliott, 315 Mich. 662.
>
> "In the Fries case a headnote reads:
>
> > "'Acceptance of plea of guilty and passing sentence for carrying concealed weapons without a license without having appointed counsel for defendant *held*, not error under record showing that he had waived examination before the magistrate, voluntarily pleaded guilty, did not indicate a desire to have counsel, and no unusual circumstances disclosed duty of court to appoint counsel.'"

The headnote thus quoted is the first of two. The second headnote, not quoted by the court, reads (294 Mich. at 383):

> "Fact that subsequent to receiving sentence for crime of carrying a concealed weapon without a license to do so defendant may have become deaf and insane is insufficient to set aside conviction *where at time plea of guilty was voluntarily entered and sentence passed record shows he was possessed of sufficient mentality to understand he had committed a crime, was being charged with it, and pleaded guilty thereto.*" (Emphasis supplied.)

The italicized portion of the second headnote indicates that the test the court applied in the *Fries* case in order to

determine whether there were such "unusual circumstances" as to require the trial court "to appoint counsel" (see first headnote) was a completely different one from that required to be applied under the decisions of this Court. And the impropriety of the test advanced in the *Fries* case is emphasized by the language of the opinion. Thus, the Michigan Supreme Court said:

> "In concluding that at the time defendant was before the circuit court his mentality was not impaired to the extent that he did not know right from wrong in relation to the offense charged or that he did not understand the nature of the offense to which he pleaded guilty we are mindful of the showing that shortly thereafter he was thought by those who had him in custody to be somewhat abnormal mentally." (294 Mich. at 384.)[11]

> "While the psychopathic report made sometime after defendant was committed to the State prison shows defective mentality, it is far from being sufficient to show that defendant was insane or an imbecile at or before the time sentence was imposed." (294 Mich. at 386.)

Application of what seems like a sanity test to determine the right to appointment of counsel is clear misconception of the law.

The trial judge apparently labored under an equally grave misconception. Thus, he was satisfied that petitioner's plea of guilty was understandingly made because, to paraphrase the test laid down in the second headnote of the *Fries* case, petitioner was capable of understanding that he had committed a crime (R. 32), that he was being charged with it (R. 49-51), and that he had pleaded guilty thereto (R. 52-53).

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[11] Fries was sentenced November 4. (294 Mich. at 383.) December 13, about six weeks later, the prison classified him as a mental case (p. 386). Later, before the hearing, he was transferred to the state hospital for the criminal insane (*ibid*).

It may even be fairly inferred from the record of the trial court proceedings on the 1947 motion that at the time of the hearing thereon, the trial judge was not aware of (or at least was not thinking in terms of) the right to an *offer of counsel* as opposed to the right to an *opportunity to retain counsel.* Only the latter is specifically referred to in the record of such hearing. Thus (R. 51):

> "Q. Did you at any time in this Court suggest to the Court that you wanted an opportunity to talk to a lawyer?
>
> "A. I don't believe I ever did, your Honor. An attorney was never mentioned to me. I was never asked if I needed one. Even when I was in the hospital, I asked them. I asked if I could have somebody call up for me. He says he wasn't allowed to let anyone in to visit me, talk to me or use the telephone."

And again (R. 63):

> "The Court: • • • I can't decide it this moment. I will give it time and dispose of it. I would like to see the opinion of the Supreme Court in the Adrain case. [The reference is to *DeMeerleer v. Michigan,* 329 U. S. 663.] It hasn't come through yet in the advance sheets and I would like to see it before I dispose of this, because as I view this, that is the only possible question that could be worthy of serious consideration in this case, would be that you pleaded guilty and were sentenced the same day. *You were not denied the right of counsel; nothing in the history and the record in this case to show that you were denied an opportunity—*" (Emphasis supplied.)

The opinions of both the Michigan courts in this case reveal a loose scrutiny of the record regarding a matter which each deemed important. Thus, the trial court stated (R. 32):

> "Even now Defendant offers no denial of having killed Mrs. Parker. The proposed motion to vacate judgment has no merit."

Similarly, the Michigan Supreme Court said (R. 98):

> "So far as disclosed, defendant has never denied and does not now deny that he shot and killed Mrs. Grace Parker. Under this record it would be an insult to one's intelligence to sustain defendant's claim that he did not understand he was charged with murder."

Both of these statements are made in the face of petitioner's following assertion at the 1947 hearing on his motion (R. 48):

> "They [the prosecutor and sheriff, during an interview at the hospital] wanted to know how it happened, and I told them I didn't really know myself because it was an accident that just couldn't be avoided. He says 'There was no accident.' He says 'You shot her.' I says 'I never shot anybody.' I says 'I never even had hold of the gun; how could I shoot anybody?' They says 'You are guilty.'"

Moreover, petitioner again and again during these proceedings asserted his innocence of the crime for which he was convicted, *i.e.*, first degree murder (R. 9, 13, 14, 33, 35, 36, 37, 38, 48).

It is one thing to maintain that petitioner should not be believed in his denial of having shot Mrs. Parker; it is quite another thing to misread the record as containing no such denial.

Quite apart from accuracy or inaccuracy, it is significant that in deciding a case involving a claimed denial of counsel, a court should deem it relevant to assert that the particular petitioner does not deny his involvement in the acts out of which the alleged crime arises. The issue being whether or not procedural due process was granted, the substantive fact of criminal involvement is beside the point. *Powell* v. *Alabama*, 287 U. S. 45, 52; see also *Townsend* v. *Burke*, 334 U. S. 736, 741; *Williams* v. *Kaiser*, 323 U. S. 471, 475; *Tomkins* v.

Missouri, 323 U. S. 485, 489. The reference to such involvement becomes even more significant when, in a case involving a charge of murder, it takes the form of a statement that the petitioner does not deny having "shot and killed" the victim. Is the intended implication of such statement that the petitioner therefore committed first degree murder? If so, it is a groundless implication. If not, it is utterly irrelevant. In either event, the statement beclouds the real issue, *viz.*, whether the petitioner was denied due process in his conviction and sentencing.

In the present case, it is noteworthy that the trial judge immediately followed his statement that petitioner "offers no denial of having killed Mrs. Parker" with the assertion that "the proposed motion to vacate judgment has no merit." This sequence, it is submitted, reveals an extremely prejudicial line of thinking. A similarly prejudicial sequence is found in the quoted statement of the Michigan Supreme Court.

This tendency of Michigan courts in proceedings challenging procedural due process to center upon factors which tend to satisfy them as to a petitioner's guilt is an old and dangerous one, representing a pattern of which the present case is but a fragment. Thus, in *People* v. *DeMeerleer*, 313 Mich. 548, reversed, 329 U. S. 663, the Michigan Supreme Court said (at 553):

> "It should be noted that at no stage of the proceedings from 1932 to the present time has DeMeerleer denied the killing of Brown."

This statement directly and typically precedes sentences embodying the decision against the defendant on his claim of denial of due process, and this part of the opinion is in turn succeeded by the following (at 555):

> "There can be no doubt from the testimony produced prior to sentence that DeMeerleer was guilty

of the crime of murder, because of a homicide committed during the perpetration of a robbery. *People* v. *Crandell, supra.* Therefore, the court did not err in denying defendant's motion for leave to file a delayed motion for a new trial."

People v. *Crandell,* 270 Mich. 124, cited in the preceding quotation, was a particularly flagrant case in the right-to-counsel field, involving a 15-year-old boy's plea of guilty to a murder charge. In holding that counsel need not have been provided him, the court said (270 Mich. at 126):

"No claim is made by defendant of coercion in obtaining the confession; neither does he now claim that the confession was not true."

In *In re Elliott,* 315 Mich. 662, one of the two Michigan cases cited by the Michigan Supreme Court in the *Quicksall* opinion as governing its decision therein (the other case being *People* v. *Fries, supra*), it was similarly stated (at 677):

"Petitioner at no time denies his guilt as charged in the information except to now claim that he was merely an 'accessory' in the commission of the crime. In legal effect, this is an admission of his guilt, under the statute abolishing the distinction between accessory and principal. 3 Comp. Laws 1929, § 17253 (Stat. Ann. § 28.979).

"We find no merit in the foregoing grounds now relied upon by petitioner for discharge from custody."

The opinions of the trial court and of the Michigan Supreme Court throw sharp light upon their approach. They use reasoning and apply standards which are improper under the decisions of this Court in right-to-counsel cases. Their findings should thus be scrutinized with great care. Cf. *Craig* v. *Harney,* 331 U. S. 367, 373, and cases there cited; see also *Watts* v. *Indiana,* 338 U. S. 49, 51.

Conclusion

The record is convincing that petitioner was not accorded due process of law. Physically and mentally ill, in dire need of help, he was rushed from the hospital to preliminary examination and then to arraignment and trial without opportunity to obtain counsel and to prepare his defense. He was not even informed that he was entitled to have counsel or of any other of his rights, or of the consequences of the plea of guilty. And he was precipitated into a highly technical trial as to degree of guilt without assistance of counsel and without proper guidance by the court. This trial was conducted in a manner highly prejudicial to him. Furthermore, petitioner's claims that he was held incommunicado and that his plea of guilty resulted from misrepresentations by state officers have received erroneous and inadequate consideration by the courts below. It is clearly established that the petitioner was denied the fundamental rights granted to him by the Fourteenth Amendment.

The judgment below, denying petitioner's motion for leave to file a delayed motion for vacation of sentence and for new trial, should be reversed.

Respectfully submitted,

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